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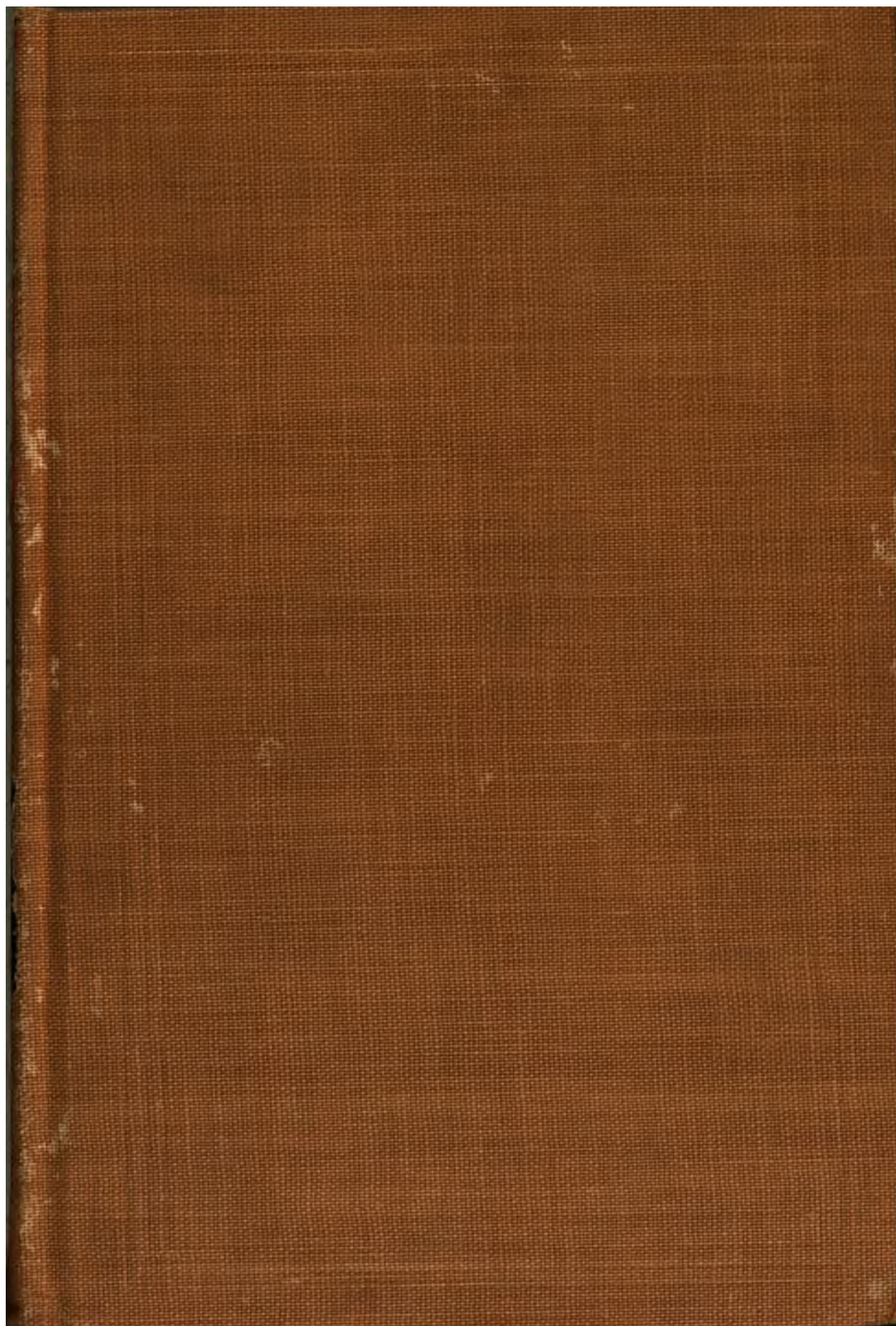
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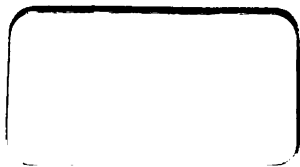
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1014
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1. 2. 3.
A. V. 1.
1. 2. 3.

The Law of Bills, Notes *and* Checks

Being

The full text of the Negotiable Instruments Law as
adopted by forty-four states, the District
of Columbia and Hawaii

WITH COPIOUS ANNOTATIONS,
FORMS & ILLUSTRATIONS

By JAMES L. WHITLEY

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Rochester, Member of Committee on Banks, New York State
Legislature and author of Police Officers Law*

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P R E F A C E

The object designed for the following volume is to guard those dealing with commercial paper and point out the dangerous spots as determined by the leading decisions of the courts of all the states. Although apparently plain, the provisions of the Negotiable Instruments Law have been the subject for many thousand legal actions and but few sections have escaped the necessity of legal interpretation. It was the aim to condense these decisions in language that would be plain to the bank clerk, bank director and the layman dealing with commercial paper, and also to collect the leading decisions for the legal practitioner for ready reference.

The want of a book of this nature has been generally expressed by bankers and the legal profession, and although the author makes no pretension to having fulfilled the requirements, it is hoped that the book may be found of service.

In order that important matters might be more forcibly impressed on the reader's mind, illustrations of negotiable and non-negotiable paper have been supplied, as have also forms used in connection with commercial paper and banking.

It has been the aim of the courts in the forty-four states in which the Negotiable Instruments Law has been adopted to construe the law to make it uniform wherever questions of the interpretation of the statute have been presented. Were this not the case the object of the framers and advocates of the law would be lost and the intent of the State Legislatures towards uniformity be reduced to wreckage.

While the Law is, with few exceptions, uniform, the numbering of the sections vary. For convenience the numbering of the New York statute has been followed, with a table of the corresponding sections of the other states.

From an almost overwhelming mass of law and precedent selection has been made of what seemed to be the most important and useful. Trusting that the volume may often aid and seldom mislead, it is submitted to the legal profession, bankers and others dealing with commercial paper.

J. L. W.

Rochester, N. Y., May 24, 1917.

The Negotiable Instruments Law adopted in the following States and Territories.

- Alabama.**—Laws of 1907, No. 722, p. 660.
- Arizona.**—Laws of 1905, Ch. 23.
- Arkansas.**—Law of 1913, Act 81.
- Colorado.**—Laws of 1897, Ch. 64.
- Connecticut.**—Laws of 1897, Ch. 74.
- Delaware.**—Laws of 1911, Ch. 191.
- District of Columbia.**—Laws of 1899, Chap. 47; 30 U. S. Stat. at L., 9, 785.
- Florida.**—Laws of 1897, Chap. 4524.
- Hawaii.**—Laws of 1907, Act 89.
- Idaho.**—Laws of 1903, p. 380.
- Illinois.**—Laws of 1907, p. 403.
- Indiana.**—Laws of 1913, Chap. 63.
- Iowa.**—Laws of 1902, Chap. 130; Laws of 1906, Chap. 149.
- Kansas.**—Laws of 1905, Chap. 310.
- Kentucky.**—Laws of 1904, Chap. 102.
- Louisiana.**—Laws of 1904, Act. 64.
- Maryland.**—Laws of 1898, Chap. 119.
- Massachusetts.**—Laws of 1898, Chap. 533; Laws of 1899, Chap. 130.
- Michigan.**—Laws of 1905, Chap. 265, p. 389.
- Minnesota.**—Laws of 1913, Chap. 272.
- Missouri.**—Laws of 1905, p. 243.
- Montana.**—Laws of 1903, Chap. 121.
- Mississippi.**—Laws of 1916, Ch. 244.
- Nebraska.**—Laws of 1905, Chap. 83.
- Nevada.**—Laws of 1907, Chap. 62.
- New Hampshire.**—Laws of 1909, Chap. 123.
- New Jersey.**—Laws of 1902, Chap. 184.
- New Mexico.**—Laws of 1907, Chap. 83.
- New York.**—Laws of 1897, Chap. 612; Laws of 1898, Chap. 336.
- North Carolina.**—Laws of 1899, Chap. 733; Laws of 1905, Chap. 327; Laws of 1907, Chap. 897.
- North Dakota.**—Laws of 1899, Chap. 113.
- Ohio.**—Laws of 1902, p. 162.
- Oklahoma.**—Laws of 1909, Chap. 24.
- Oregon.**—Laws of 1899, p. 18.
- Pennsylvania.**—Laws of 1901, p. 194.
- Rhode Island.**—Laws of 1899, Chap. 674.
- South Carolina.**—Laws of 1914, Act. No. 396, p. 668.

South Dakota.—Laws of 1913, Chap. 279.
Tennessee.—Laws of 1899, Chap. 94.
Utah.—Laws of 1899, Chap. 83.
Vermont.—Laws of 1912, p. 114.
Virginia.—Laws of 1898, Chap. 866.
Washington.—Laws of 1899, Chap. 149.
West Virginia.—Laws of 1907, Chap. 81.
Wisconsin.—Laws of 1899, Chap. 356.
Wyoming.—Laws of 1905, Chap. 43.

I

Table of Corresponding Sections of the

X N. L. L.	1 Mo.	2 Ariz.	3 Cal.	4 Conn.	5 D. C.	6 Fla.	7 Mo.	8 Ill.	9 Kan.	10 Ky.	11 Md.	12 Mass.	13 Mich.
1	4958	3304	4464	4171	1305	2935	3458	1	4540	1897	20	18	3
2	4959	3305	4465	4172	1306	2936	3459	2	4541	1898	21	19	4
3	4960	3306	4466	4173	1307	2937	3460	3	4542	1899	22	20	5
4	4961	3307	4467	4174	1308	2938 2938	3461	4	4543	1900	23	21	6
5	4962	3308	4468	4175	1309	2939	3462	5	4544	1901	24	22	7
6	4963	3309	4469	4176	1310	2940	3463	6	4545	1902	25	23	8
7	4965	3310	4470	4177	1312	2941	3464	7	4546	1903	26	24	9
8	4965	3311	4471	4178	1312	2942	3465	8	4547	1904	27	25	10
9	4966	3312	4472	4179	1313	2943	3466	9	4548	1905	28	26	11
10	4967	3313	4473	4180	1314	2944	3467	10	4549	1906	29	27	12
11	4968	3314	4474	4181	1315	2945	3468	11	4550	1907	30	28	13
12	4969	3315	4475	4182	1316	2946	3469	12	4551	1908	31	29	14
13	4970	3316	4476	4183	1317	2947	3470	13	4552	1909	32	30	15
14	4971	3317	4477	4184	1318	2948	3471	14	4553	1910	33	31	16
15	4972	3318	4478	4185	1319	2949	3472	15	4554	1911	34	32	17
16	4973	3319	4479	4186	1320	2950	3473	16	4555	1912	35	33	18
17	4974	3320	4480	4187	1321	2951	3474	17	4556	1913	36	34	19
18	4975	3321	4481	4188	1322	2952	3475	18	4557	1914	37	35	20
19	4976	3322	4482	4189	1323	2953	3476	19	4558	1915	38	36	21
20	4977	3323	4483	4190	1324	2954	3477	20	4559	1916	39	37	22
21	4978	3324	4484	4191	1325	2955	3478	21	4560	1917	40	38	23
22	4979	3325	4485	4192	1326	2956	3479	22	4561	1918	41	39	24
23	4980	3326	4486	4193	1327	2957	3480	23	4562	1919	42	40	25
24	4981	3327	4487	4194	1328	2958	3481	24	4563	1884	43	41	26
25	4982	3328	4488	4195	1329	2959	3482	25	4564	1885	44	42	27
26	4982	3329	4489	4196	1330	2960	3483	26	4565	1886	45	43	28
27	4982	3330	4490	4197	1331	2961	3484	27	4566	1887	46	44	29
28	4983	3331	4491	4198	1332	2962	3485	28	4567	1888	47	45	30
29	4984	3332	4492	4199	1333	2963	3486	29	4568	1889	48	46	31
30	4985	3333	4493	4200	1334	2964	3487	30	4569	1939	49	47	32
31	4986	3334	4494	4201	1335	2965	3488	31	4570	1940	50	48	33
32	4987	3335	4495	4202	1336	2966	3489	32	4571	1941	51	49	34
33	4988	3336	4496	4203	1337	2967	3490	33	4572	1942	52	50	35
34	4989	3337	4497	4204	1338	2968	3491	34	4573	1943	53	51	36
35	4990	3338	4498	4205	1339	2969	3492	35	4574	1944	54	52	37

Law in the Various States and Territories

II

14 Mass.	15 Mass.	16 R. I.	17 R. I.	18 R. I.	19 R. I.	20 Oct.	21 Ohio	22 Ore.	23 R. I.	24 R. I.	25 Tenn.	26 Utah	27 Wyo.
5849	1	1	20	2151	6303	1	3171	4403	7	1	1	1553	1675-1
5850	2	2	21	2152	6304	2	3171a	4404	8	2	2	1554	1675-2
5851	3	3	22	2153	6305	3	3171b	4405	9	3	3	1555	1675-3
5852	4	4	23	2156	6306	4	3171c	4406	10	4	4	1556	1675-4
5853	5	5	24	2154	6307	5	3171d	4407	11	5	5	1557	1675-5
5854	6	6	25	2155	6308	6	3171e	4408	12	6	6	1558	1675-6
5855	7	7	26	2157	6309	7	3171f	4409	13	7	7	1559	1675-7
5856	8	8	27	2158	6310	8	3171g	4410	14	8	8	1560	1675-8
5857	9	9	28	2159	6311	9	3171h	4411	15	9	9	1561	1675-9
5858	10	10	29	2160	6312	10	3171i	4412	16	10	10	1562	1675-10
5859	11	11	30	2161	6313	11	3171j	4413	17	11	11	1563	1675-11
5860	12	12	31	2162	6314	12	3171k	4414	18	12	12	1564	1675-12
5861	13	13	32	2163	6315	13	3171l	4415	19	13	13	1565	1675-13
5862	14	14	33	2164	6316	14	3171m	4416	20	14	14	1566	1675-14
5863	15	15	34	2165	6317	15	3171n	4417	21	15	15	1567	1675-15
5864	16	16	35	2166	6318	16	3171o	4418	22	16	16	1568	1675-16
5865	17	17	36	2341	6319	17	3171p	4419	23	17	17	1569	1675-17
5866	18	18	37	2167	6320	18	3171q	4420	24	18	18	1570	1675-18
5867	19	19	38	2168	6321	19	3171r	4421	25	19	19	1571	1675-19
5868	20	20	39	2169	6322	20	3171s	4422	26	20	20	1572	1675-20
5869	21	21	40	2170	6323	21	3171t	4423	27	21	21	1573	1675-21
5870	22	22	41	2180	6324	22	3171u	4424	28	22	22	1574	1675-22
5871	23	23	42	2171	6325	23	3171v	4425	29	23	23	1575	1675-23
5872	24	24	50	2172	6326	24	3171w	4426	30	24	24	1576	1675-50
5873	25	25	51	2173	6327	25	3171x	4427	31	25	25	1577	1675-51
5874	26	26	52	2174	6328	26	3171y	4428	32	26	26	1578	1675-52
5875	27	27	53	2175	6329	27	3171z	4429	33	27	27	1579	1675-53
5876	28	28	54	2176	6330	28	3172	4430	34	28	28	1580	1675-54
5877	29	29	55	2177	6331	29	3172a	4431	35	29	29	1581	1675-55
5878	30	30	60	2178	6332	30	3172b	4432	36	30	35	1582	1676
5879	31	31	61	2179	6333	31	3172c	4433	37	31	31	1583	1676-1
5880	32	32	62	2181	6334	32	3172d	4434	38	32	32	1584	1676-2
5881	33	33	63	2182	6335	33	3172e	4435	39	33	33	1585	1676-3
5882	34	34	64	2183	6336	34	3172f	4436	40	34	34	1586	1676-4
5883	35	35	65	2184	6337	35	3172g	4437	41	35	35	1587	1676-5

III

X N. L. L.	1 Mo.	2 Ariz.	3 Cal.	4 Conn.	5 D. C.	6 Fla.	7 Ida.	8 Ill.	9 Kan.	10 Ky.	11 Md.	12 Mass.	13 Mich.
36	4991	3339	4499	4206	1340	2970	3493	36	4575	1945	55	53	38
37	4992	3340	4500	4207	1341	2971	3494	37	4576	1946	56	54	39
38	4993	3341	4501	4208	1342	2972	3495	38	4577	1947	57	55	40
39	4994	3342	4502	4209	1343	2973	3496	39	4578	1948	58	56	41
40	4995	3343	4503	4210	1344	2974	3497	40	4579	1949	59	57	42
41	4996	3344	4504	4211	1345	2975	3498	41	4580	1950	60	58	43
42	4997	3345	4505	4212	1346	2976	3499	42	4581	1951	61	59	44
43	4998	3346	4506	4213	1347	2977	3500	43	4582	1952	62	60	45
44	4999	3347	4507	4214	1348	2978	3501	44	4583	1953	63	61	46
45	5000	3348	4508	4215	1349	2979	3502	45	4584	1954	64	62	47
46	5001	3349	4509	4216	1350	2979	3503	46	4585	1955	65	63	48
47	5002	3350	4510	4217	1351	2980	3504	47	4586	1956	66	64	49
48	5003	3351	4511	4218	1352	2981	3505	48	4587	1957	67	65	50
49	5004	3352	4512	4219	1353	2982	3506	49	4588	1958	68	66	51
50	5005	3353	4513	4220	1354	2983	3507	50	4589	1958	69	67	52
51	5006	3354	4514	4221	1355	2984	3508	51	4590	1920	70	68	53
52	5007	3355	4515	4222	1356	2985	3509	52	4591	1921	71	69	54
53	5008	3356	4516	4223	1357	2986	3510	53	4592	1922	72	70	55
54	5009	3357	4517	4224	1358	2987	3511	54	4593	1923	73	71	56
55	5010	3358	4518	4225	1359	2988	3512	55	4594	1924	74	72	57
56	5011	3359	4519	4226	1360	2989	3513	56	4595	1925	75	73	58
57	5012	3360	4520	4427	1361	2990	3514	57	4596	1926	76	74	59
58	5013	3361	4521	4228	1362	2991	3515	58	4597	1927	77	75	60
59	5014	3362	4522	4229	1363	2992	3516	59	4598	1928	78	76	61
60	5015	3363	4523	4230	1364	2993	3517	60	4599	1929	79	77	62
61	5016	3364	4524	4231	1365	2994	3518	61	4600	1930	80	78	63
62	5017	3365	4525	4232	1366	2995	3519	62	4601	1931	81	79	64
63	5018	3366	4526	4233	1367	2996	3520	63	4602	1932	82	80	65
64	5019	3367	4527	4234	1368	2947	3521	64	4603	1933	83	81	66
65	5020	3368	4528	4235	1369	2948	3522	65	4604	1934	84	82	67
66	5021	3369	4529	4236	1370	2999	3523	66	4605	1935	85	83	68
67	5022	3370	4530	4237	1371	3000	3524	67	4606	1936	86	84	69
68	5023	3371	4531	4238	1372	3001	3525	68	4607	1937	87	85	70
69	5024	3372	4532	4239	1373	3002	3526	69	4608	1938	88	86	71
70	5025	3373	4533	4240	1374	3003	3527	70	4609	1990	89	87	72
71	5026	3374	4534	4241	1375	3004	3528	71	4610	1991	90	88	73
72	5027	3375	4535	4242	1376	3005	4529	72	4611	1992	91	89	74
73	5028	3376	4536	4243	1377	3006	3530	73	4612	1993	92	90	75
74	5029	3377	4537	4244	1378	3007	3531	74	4613	1994	93	91	76
75	5030	3378	4538	4245	1379	3008	3532	75	4614	1995	94	92	77

14 Mo.	15 Feb.	16 N. H.	17 N. Y.	18 N. C.	19 N. D.	20 Ok.	21 Ohio	22 Ore.	23 R. I.	24 S. D.	25 Tenn.	26 Utah	27 Wb.
5884	36	36	66	2185	6338	36	3172h	4438	42	36	36	1588	1676-6
5885	37	37	67	2186	6339	37	3172i	4439	43	37	37	1589	1676-7
5886	38	38	68	2187	6340	38	3172j	4440	44	38	38	1590	1676-8
5887	39	39	69	2188	6341	39	3172k	4441	45	39	39	1591	1676-9
5888	40	40	70	2189	6342	40	3172l	4442	46	40	40	1592	1676-10
5889	41	41	71	2190	6343	41	3172m	4443	47	41	41	1593	1676-11
5890	42	42	72	2191	6344	42	3173n	4444	48	42	42	1594	1676-12
5891	43	43	73	2192	6345	43	3172o	4445	49	43	43	1595	1676-13
5892	44	44	74	2193	6346	44	3172p	4446	50	44	44	1596	1676-14
5893	45	45	75	2194	6347	45	3172q	4447	51	45	45	1597	1676-15
5894	46	46	76	2195	6348	46	3172r	4448	52	46	46	1598	1676-16
5895	47	47	77	2196	6349	47	3172s	4449	53	47	47	1599	1676-17
5896	48	48	78	2197	6350	48	3172t	4450	54	48	48	1600	1676-18
5897	49	49	79	2198	6351	49	3172u	4451	55	49	49	1601	1676-19
5898	50	50	80	2199	6352	50	3172v	4452	56	50	50	1602	1676-20
5899	51	51	90	2200	6353	51	3172w	4453	57	51	51	1603	1676-21
5900	52	52	91	2201	6354	52	3172x	4454	58	52	52	1604	1676-22
5901	53	53	92	2202	6355	53	3172y	4455	59	53	53	1605	1676-23
5902	54	54	93	2203	6356	54	3172z	4456	60	54	54	1606	1676-24
5903	55	55	94	2204	6357	55	3173	4457	61	55	55	1607	1676-25
5904	56	56	95	2205	6358	56	3173a	4458	62	56	56	1608	1676-26
5905	57	57	96	2206	6359	57	3173b	4459	63	57	57	1609	1676-27
5906	58	58	97	2207	6360	57	3173c	4460	64	58	58	1610	1676-28
5907	59	59	98	2208	6361	59	3173d	4461	65	59	59	1611	1676-29
5908	60	60	110	2209	6362	60	3173e	4462	66	60	60	1612	1677
5909	61	61	111	2210	6363	61	3173f	4463	67	61	61	1613	1677-1
5910	62	62	112	2211	6364	63	3173g	4464	68	62	62	1614	1677-2
5911	63	63	113	2212	6365	63	3173h	4465	69	63	63	1615	1677-3
5912	64	64	114	2213	6366	64	3173i	4466	70	64	64	1616	1677-4
5913	65	65	115	2214	6367	65	3173j	4467	71	65	65	1617	1677-5
5914	66	66	116	2215	6368	66	3173k	4468	72	66	66	1618	1677-6
5915	67	67	117	2216	6369	67	3173l	4469	73	67	67	1619	1677-7
5916	68	68	118	2217	6370	68	3173m	4470	74	68	68	1620	1677-8
5917	69	69	119	2218	6371	69	3173n	4471	75	69	69	1621	1677-9
5918	70	70	130	2219	6372	70	3173o	4472	76	70	70	1622	1678
5919	71	71	131	2220	6373	71	3173p	4473	77	71	71	1623	1678-1
5920	72	72	132	2221	6374	72	3173q	4474	78	72	72	1624	1678-2
5921	73	73	133	2222	6375	73	3173r	4475	79	73	73	1625	1678-3
5922	74	74	134	2223	6376	74	3173s	4476	80	74	74	1626	1678-4
5923	75	75	135	2224	6377	75	3173t	4477	81	75	75	1627	1678-5

V

X N. I. L.	1 Mo.	2 Artz.	3 Cal.	4 Conn.	5 D. C.	6 Fla.	7 Ida.	8 Ill.	9 Kan.	10 Ky.	11 Md.	12 Mass.	13 Mich.
76	5031	3379	4539	4246	1380	3009	3533	76	4615	1996	95	93	78
77	5032	3380	4540	4247	1381	3010	3534	77	4616	1997	96	94	79
78	5033	3381	4541	4248	1382	3011	3535	78	4617	1998	97	95	80
79	5034	3382	4542	4549	1383	3012	3536	79	4618	1999	98	96	81
80	5035	3383	4543	4250	1384	3012	3537	80	4619	2000	99	97	82
81	5036	3384	4544	4251	1385	3013	3538	81	4620	2001	100	98	83
82	5037	3385	4545	4252	1386	3014	3539	82	4621	2002	101	99	84
83	5038	3386	4546	4253	1387	3015	3540	83	4622	2003	102	100	85
84	5038	3387	4547	4254	1388	3016	3541	84	4623	2004	103	101	86
85	5039	3388	4548	4255	1389	3017	3542	85	4624	2005	104	102	87
86	5040	3389	4549	4256	1390	3017	3543	86	4625	2006	105	103	88
87	5041	3390	4550	4257	1391	3018	3544	87	4626	2007	106	104	89
88	5042	3391	4551	4258	1392	3019	3545	87	4627	2008	107	105	90
89	5043	2392	4552	4259	1393	3020	3546	88	4628	1960	108	106	91
90	5044	3393	4553	4260	1394	3021	3547	89	4629	1961	109	107	92
91	5045	3394	4554	4261	1395	3022	3548	90	4630	1962	110	108	93
92	5046	3395	4555	4262	1396	3023	3549	91	4631	1963	111	109	94
93	5047	3396	4556	4263	1397	3024	3550	92	4632	1964	112	110	95
94	5047	3397	4557	4264	1398	3025	3551	93	4633	1965	113	111	96
95	5048	3398	4558	4265	1399	3026	3552	94	4634	1966	114	112	97
96	5048	3399	4559	4266	1400	3027	3553	95	4635	1967	115	113	98
97	5049	3400	4560	4267	1401	3027	3554	96	4636	1968	116	114	99
98	5050	3401	4561	4268	1402	3028	3555	97	4637	1969	117	115	100
99	5051	3402	4562	4269	1403	3029	3556	98	4638	1970	118	116	101
100	5052	3403	4563	4270	1404	3029	3557	99	4639	1971	119	117	102
101	5053	3404	4564	4271	1405	3030	3558	100	4640	1972	120	118	103
102	5054	3405	4565	4272	1406	3031	3559	101	4641	1973	121	119	104
103	5055	3406	4566	4273	1407	3031	3560	102	4642	1974	122	120	105
104	5056	3407	4567	4274	1408	3032	3561	103	4643	1975	123	121	106
105	5057	3408	4568	4275	1409	3033	3562	104	4644	1976	124	122	107
106	5056	3409	4569	4276	1410	3033	3563	105	4645	1977	125	123	108
107	5058	3410	4570	4277	1411	3034	3564	106	4646	1978	126	124	109
108	5059	3411	4571	4278	1412	3035	3565	107	4647	1979	127	125	110
109	5060	3412	4572	4279	1413	3036	3566	108	4648	1980	128	126	111
110	5060	3413	4573	4280	1414	3036	3567	109	4649	1981	129	127	112
111	5060	3414	4574	4281	1415	3036	3568	110	4650	1982	130	128	113
112	5061	3415	4575	4282	1416	3037	3569	111	4651	1983	131	129	114
113	5062	3416	4576	4283	1417	3038	3570	112	4652	1984	132	130	115
114	5063	3417	4577	4284	1418	3039	3571	113	4653	1985	133	131	116
115	5064	3418	4578	4285	1419	3039	3572	114	4654	1986	134	132	117

14	15	16	17	18	19	20	21	22	23	24	25	26	27
Wm.	Rob.	H. E.	H. T.	H. C.	H. E.	W. J.	Wm.	Wm.	H. E.	H. E.	Wm.	Wm.	Wm.
5924	76	76	136	2225	6378	76	3173u	4478	82	76	76	1628	1678-6
5925	77	77	137	2226	6379	77	3173v	4479	83	77	77	1629	1678-7
5926	78	78	138	2227	6380	78	3173w	4480	84	78	78	1630	1678-8
5927	79	79	139	2228	6381	79	3173x	4481	85	79	79	1631	1678-9
5928	80	80	140	2229	6382	80	3173y	4482	86	80	80	1632	1678-10
5929	81	81	141	2230	6383	81	3173z	4483	87	81	81	1633	1678-11
5930	82	82	142	2231	6384	82	3174	4484	88	82	82	1634	1678-12
5931	83	83	143	2232	6385	83	3174a	4485	89	83	83	1635	1678-13
5932	84	84	144	2233	6386	84	3174b	4486	90	84	84	1636	1678-14
5933	85	85	145	2234	6387	85	3174c	4487	91	85	85	1637	1678-15
5934	86	86	146	2236	6388	86	3174d	4488	92	86	86	1638	1678-16
5935	87	87	147	2237	6389	87	3174e	4489	93	87	87	1639	1678-17
5936	88	88	148	2238	6390	88	3174f	4490	94	88	88	1640	1678-18
5937	89	89	149	2239	6391	89	3174g	4491	95	89	89	1641	1678-19
5938	90	90	150	2240	6392	90	3174h	4492	96	90	90	1642	1678-20
5939	91	91	151	2241	6393	91	3174i	4493	97	91	91	1643	1678-21
5940	92	92	152	2242	6394	92	3174j	4494	98	92	92	1644	1678-22
5941	93	93	153	2243	6395	93	3174k	4495	99	93	93	1645	1678-23
5942	94	94	154	2244	6396	94	3174l	4496	100	94	94	1646	1678-24
5943	95	95	155	2245	6397	95	3174m	4497	101	95	95	1647	1678-25
5944	96	96	156	2246	6398	96	3174n	4498	102	96	96	1648	1678-26
5945	97	97	157	2247	6399	97	3174o	4499	103	97	97	1649	1678-27
5946	98	98	158	2248	6400	98	3174p	4500	104	98	98	1650	1678-28
5947	99	99	159	2249	6401	99	3174q	4501	105	99	99	1651	1678-29
5948	100	100	160	2250	6402	100	3174r	4502	106	100	100	1652	1678-30
5949	101	101	161	2251	6403	101	3174s	4503	107	101	101	1653	1678-31
5950	102	102	162	2252	6404	102	3174t	4504	108	102	102	1654	1678-32
5951	103	103	163	2253	6405	103	3174u	4505	109	103	103	1655	1678-33
5952	104	104	164	2254	6406	104	3174v	4506	110	104	104	1656	1678-34
5953	105	105	165	2255	6407	105	3174w	4507	111	105	105	1657	1678-35
5954	106	106	166	2256	6408	106	3174x	4508	112	106	106	1658	1678-36
5955	107	107	167	2257	6409	107	3174y	4509	113	107	107	1659	1678-37
5956	108	108	168	2258	6410	108	3174z	4510	114	108	108	1660	1678-38
5957	109	109	169	2259	6411	109	3175	4511	115	109	109	1661	1678-39
5958	110	110	170	2260	6412	110	3175a	4512	116	110	110	1662	1678-40
5959	111	111	171	2261	6413	111	3175b	4513	117	111	111	1663	1678-41
5960	112	112	172	2262	6414	112	3175c	4514	118	112	112	1664	1678-42
5961	113	113	173	2263	6415	113	3175d	4515	119	113	113	1665	1678-43
5962	114	114	174	2264	6416	114	3175e	4516	120	114	114	1665x	1678-44
5963	115	115	175	2265	6417	115	3175f	4517	121	115	115	1665x1	1678-45

VII

X N. I. L.	1 Ala.	2 Ariz.	3 Cal.	4 Conn.	5 D. C.	6 Fla.	7 Ga.	8 Ill.	9 Kan.	10 Ky.	11 Md.	12 Mass.	13 Mich.
116	5065	3419	4579	4286	1420	3039	3573	115	4655	1987	135	133	118
117	5066	3420	4580	4287	1421	3040	3574	116	4656	1988	136	134	119
118	5067	3421	4581	4288	1422	3041	3575	117	4657	1989	137	135	120
119	5068	3422	4582	4289	1423	3042	3576	118	4658	1890	138	136	121
120	5069	3423	4683	4290	1424	3042	3577	119	4659	1891	139	137	122
121	5070	3424	4584	4291	1425	3043	3578	120	4660	1892	140	138	123
122	5071	3425	4585	4292	1426	3044	3579	121	4661	1893	141	139	124
123	5072	3426	4586	4293	1427	3045	3580	122	4662	1894	142	140	125
124	5073	3427	4587	4294	1428	3046	3581	123	4663	1895	143	141	126
125	5074	3428	4588	4295	1429	3046	3582	124	4664	1896	144	142	127
126	5075	3429	4589	4296	1430	3047	3583	125	4665	1826	145	143	128
127	5076	3430	4590	4297	1431	3047	3584	126	4666	1827	146	144	129
128	5077	3431	4591	4298	1432	3047	3585	127	4667	1828	147	145	130
129	5078	3432	4592	4299	1433	3048	3586	128	4668	1829	148	146	131
130	5079	3433	4593	4300	1434	3049	3587	129	4669	1830	149	147	132
131	5080	3434	4594	4301	1435	3050	3588	130	4670	1831	150	148	133
132	5081	3435	4595	4302	1436	3051	3589	131	4671	1832	151	149	134
133	5082	3436	4596	4303	1437	3051	3590	132	4672	1833	152	150	135
134	5083	3437	4597	4304	1438	3051	3591	133	4673	1834	153	151	136
135	5084	3438	4598	4305	1439	3052	3592	134	4674	1835	154	152	137
136	5085	3439	4599	4306	1440	3053	3593	135	4675	1836	155	153	138
137	5086	3440	4600	4307	1441	3054	3594	...	4676	1837	156	154	139
138	5087	3441	4601	4308	1442	3055	3595	136	4677	1838	157	155	140
139	5088	3442	4602	4309	1443	3056	3596	138	4678	1839	158	156	141
140	5089	3443	4603	4310	1444	3056	3597	139	4679	1840	159	157	142
141	5090	3444	4604	4311	1445	3056	3598	140	4680	1841	160	158	143
142	5091	3445	4605	4312	1446	3057	3599	141	4681	1842	161	159	144
143	5092	3446	4606	4313	1447	3058	3600	142	4682	1843	162	160	145
144	5093	3447	4607	4314	1448	3059	3601	143	4683	1844	163	161	146
145	5094	3448	4608	4315	1449	3060	3602	144	4684	1845	164	162	147
146	5094	3449	4609	4316	1450	3061	3603	145	4685	1846	165	163	148
147	5095	3450	4610	4317	1451	3062	3604	146	4686	1847	166	164	149
148	5095	3451	4611	4318	1452	3062	3605	147	4687	1848	167	165	150
149	5097	3452	4612	4319	1453	3063	3606	148	4688	1849	168	166	151
150	5098	3453	4613	4320	1454	3063	3607	149	4689	1850	169	167	152
151	5099	3454	4614	4321	1455	3064	3608	150	4690	1851	170	168	153
152	5100	3455	4615	4322	1456	3065	3609	151	4691	1875	171	169	154
153	5101	3456	4616	4323	1457	3066	3610	152	4692	1876	172	170	155
154	5102	3457	4617	4324	1458	3066	3611	153	4693	1877	173	171	156
155	5103	3458	4618	4325	1459	3067	3612	154	4694	1873	174	172	157

14 Mon.	15 Tue.	16 W.	17 Th.	18 F.	19 S.	20 Su.	21 Mon.	22 Tue.	23 W.	24 Th.	25 F.	26 S.	27 Su.
5964	115	116	187	2266	6418	116	3175g	4518	122	115	116	1665x2	1678-46
5965	116	117	188	2267	6419	117	3175h	4519	123	116	117	1665x3	1678-47
5966	117	118	189	2268	6420	118	3175i	4520	124	117	118	1665x4	1678-48
5967	118	119	200	2269	6421	119	3175j	4521	125	118	119	1665x5	1679
5968	119	120	201	2270	6422	120	3175k	4522	126	119	120	1665x6	1679-1
5969	120	121	202	2271	6423	121	3175l	4523	127	120	121	1665x7	1679-2
5970	121	122	203	2272	6424	122	3175m	4524	128	121	122	1665x8	1679-3
5971	122	123	204	2273	6425	123	3175n	4525	129	122	123	1665x9	1679-4
5972	123	124	205	2274	6426	124	3175o	4526	130	123	124	1665x10	1679-5
5973	124	125	206	2275	6427	125	3175p	4527	131	124	125	1665x11	1679-6
5974	125	126	210	2276	6428	126	3175q	4528	132	125	126	1664x12	1680
5975	126	127	211	2277	6429	127	3175r	4529	133	126	127	1665x13	1680a
5976	127	128	212	2278	6430	128	3175s	4530	134	127	128	1665x14	1680b
5977	128	129	213	2279	6431	129	3175t	4531	135	128	129	1665x15	1680c
5978	129	130	214	2280	6432	130	3175u	4532	136	129	130	1665x16	1680d
5979	130	131	215	2281	6433	131	3175v	4533	137	130	131	1665x17	1680e
5980	131	132	220	2282	6434	132	3175w	4534	138	131	132	1665x18	1680f
5981	132	133	221	2283	6435	133	3175x	4535	139	132	133	1665x19	1680g
5982	133	134	222	2284	6436	134	3175y	4536	140	133	134	1665x20	1680h
5983	134	135	223	2285	6437	135	3175z	4537	141	134	135	1665x21	1680i
5984	135	136	224	2286	6438	136	3176	4538	142	135	136	1665x22	1680j
5985	136	137	225	2287	6439	137	3176a	4539	143	136	137	1665x23	1680k
5986	137	138	226	2288	6440	138	3176b	4540	144	137	138	1665x24	1680l
5987	138	139	227	2289	6441	139	3176c	4541	145	138	139	1665x25	1680m
5988	139	140	228	2290	6442	140	3176d	4542	146	139	140	1665x26	1680n
5989	140	141	229	2291	6443	141	3176e	4543	147	140	141	1665x27	1680o
5990	141	142	230	2292	6444	142	3176f	4544	148	141	142	1665x28	1680p
5991	142	143	240	2293	6445	143	3176g	4545	149	142	143	1665x29	1681
5992	143	144	241	2294	6446	144	3176h	4546	150	143	144	1665x30	1681-1
5993	144	145	242	2295	6447	145	3176i	4547	151	144	145	1665x31	1681-2
5994	145	146	243	2296	6448	146	3176j	4548	152	145	146	1665x32	1681-3
5995	146	147	244	2297	6449	147	3176k	4549	153	146	147	1665x33	1681-4
5996	147	148	245	2298	6450	148	3176l	4550	154	147	148	1665x35	1681-5
5997	148	149	246	2299	6451	149	3176m	4551	155	148	149	1665x35	1681-6
5998	149	150	247	2300	6452	150	3176n	4552	156	149	150	1665x36	1681-7
5999	150	151	248	2301	6453	151	3176o	4553	157	150	151	1665x37	1681-8
6000	151	152	260	2302	6454	152	3176p	4554	158	151	152	1665x38	1681-9
6001	152	153	261	2303	6455	153	3176q	4555	159	152	153	1665x39	1681-10
6002	153	154	262	2304	6456	154	3176r	4556	160	153	154	1665x40	1681-11
6003	154	155	263	2305	6457	155	3176s	4557	161	154	155	1665x41	1681-12

IX

X N.L.L.	1 Mo.	2 Artz.	3 Col.	4 Conn.	5 D. C.	6 Fla.	7 Ida.	8 Ill.	9 Kan.	10 Ky.	11 Md.	12 Mass.	13 Mich.
156	5104	3459	4619	4326	1460	3067	3613	155	4695	1879	175	173	158
157	5105	3460	4620	4327	1461	3068	3614	156	4696	1880	176	174	159
158	5106	3461	4621	4328	1462	3069	3615	157	4697	1881	177	175	160
159	5107	3462	4622	4329	1463	3070	3616	158	4698	1882	178	176	161
160	5108	3463	4623	4330	1464	3071	3617	159	4699	1883	179	177	162
161	5109	3464	4624	4331	1465	3073	3618	160	4700	1852	180	178	163
162	5110	3465	4625	4332	1466	3074	3619	161	4701	1853	181	179	164
163	5111	3466	4626	4333	1467	3075	3620	162	4702	1854	182	180	165
164	5112	3467	4627	4334	1468	3076	3621	163	4703	1855	183	181	166
165	5113	3468	4628	4335	1469	3076	3622	164	4704	1856	184	182	167
166	5114	3469	4629	4336	1470	3077	3623	165	4705	1857	185	183	168
167	5115	3470	4630	4337	1471	3078	3624	166	4706	1858	186	184	169
168	5116	3471	4631	4338	1472	3079	3625	167	4707	1859	187	185	170
169	5117	3472	4632	4339	1473	3080	3626	168	4708	1860	188	186	171
170	5118	3473	4633	4340	1474	3081	3627	169	4709	1861	189	187	172
171	5119	3474	4634	4341	1475	3082	3628	170	4710	1868	190	188	173
172	5120	3475	4635	4342	1476	3082	3629	171	4711	1869	191	189	174
173	5120	3476	4636	4343	1477	3083	3630	172	4712	1870	192	190	175
174	5121	3477	4637	4344	1478	3084	3631	173	4713	1871	193	191	176
175	5122	3478	4638	4345	1479	3085	3632	174	4714	1872	194	192	177
176	5123	3479	4639	4346	1480	3086	3633	175	4715	1873	195	193	178
177	5124	3480	4640	4347	1481	3086	3634	176	4716	1874	196	194	179
178	5125	3481	4641	4348	1482	3087	3635	177	4717	1862	197	195	180
179	5126	3482	4642	4349	1483	3088	3636	178	4718	1863	198	196	181
180	5127	3483	4643	4350	1484	3089	3637	179	4719	1864	199	197	182
181	5128	3484	4644	4351	1485	3090	3638	180	4720	1865	200	198	183
182	5129	3485	4645	4352	1486	3091	3639	181	4721	1866	201	199	184
183	5130	3486	4646	4353	1487	3092	3640	182	4722	1867	202	200	185
184	5031	3487	4647	4354	1488	3093	3641	183	4723	2009	203	201	186
185	5032	3487	4648	4355	1489	3094	3642	184	4724	2010	204	202	187
186	5033	3487	4649	4356	1490	3095	3643	185	4725	2011	205	203	188
187	5034	3487	4650	4357	1491	3096	3644	186	4726	2012	206	204	189
188	5035	3487	4651	4358	1492	3097	3645	187	4727	2013	207	205	190
189	5036	3487	4652	4359	1493	3098	3646	188	4728	2014	208	206	191
190	5037	....	4653	....	....	2934	3647	189	4533	....	13	...	1
191	5038	3487	4654	4170	1304	2934	3648	190	4534	1820	14	207	2
192	5039	3488	4655	4170	1304	2934	3649	191	4535	1821	15	208	2
193	5040	3489	4656	4170	1304	2934	3650	192	4536	1822	16	209	2
194	5041	3490	4657	4170	1304	2934	3651	193	4537	1823	17	210	2
195	5042	....	4658	4170	1304	....	3652	194	4538	1824	18	211	2
196	5043	3491	4659	4170	1304	2934	3653	195	4539	....	19	212	2
197	....	....	....	....	....	....	....	196	....	....	19	...	...
198	....	....	....	....	....	....	....	....	....	....	...	...	...

14	15	16	17	18	19	20	21	22	23	24	25	26	27
No.	No.	N. H.	N. Y.	N. C.	N. D.	Ill.	Ohio	Wis.	I. I.	I. R.	Tenn.	Miss.	W. Va.
6004	155	156	264	2306	6458	156	3176t	4558	162	154	156	1665x42	1681-13
6005	156	157	265	2307	6459	157	3176u	4559	163	155	157	1665x43	1681-14
6006	157	158	266	2308	6460	158	3176v	4560	164	156	158	1665x44	1681-15
6007	158	159	267	2309	6461	159	3176w	4561	165	157	159	1665x45	1681-16
6008	159	160	268	2310	6462	160	3176x	4562	166	158	160	1665x46	1681-17
6009	160	161	280	2311	6463	161	3176y	4563	167	159	161	1665x47	1681-18
6010	161	162	281	2312	6464	162	3176z	4564	168	160	162	1665x48	1681-19
6011	162	163	282	2313	6465	163	3177	4565	169	161	163	1665x49	1681-20
6012	163	164	283	2314	6466	164	3177a	4566	170	162	164	1665x50	1681-21
6013	164	165	284	2315	6467	165	3177b	4567	171	163	165	1665x51	1681-22
6014	165	166	285	2316	6468	166	3177c	4568	172	164	166	1665x52	1681-23
6015	166	167	286	2317	6469	167	3177d	4569	173	165	167	1665x53	1681-24
6016	167	168	287	2318	6470	168	3177e	4570	174	166	168	1665x54	1681-25
6017	168	169	288	2319	6471	169	3177f	4571	175	167	169	1665x55	1681-26
6018	169	170	289	2320	6472	170	3177g	4572	176	168	170	1665x56	1681-27
6019	170	171	300	2321	6473	171	3177h	4573	177	169	171	1665x57	1681-28
6020	171	172	301	2322	6474	172	3177i	4574	178	170	172	1665x58	1681-29
6021	172	173	302	2323	6475	173	3177j	4575	179	171	173	1665x59	1681-30
6022	173	174	303	2324	6476	174	3177k	4576	180	172	174	1665x60	1681-31
6023	174	175	304	2325	6477	175	3177l	4577	181	173	175	1665x61	1681-32
6024	175	176	305	2326	6478	176	3177m	4578	182	174	176	1665x62	1681-33
6025	176	177	306	2327	6479	177	3177n	4579	183	175	177	1665x63	1681-34
6026	177	178	310	2328	6480	178	3177o	4580	184	176	178	1665x64	1681-35
6027	178	179	311	2329	6481	179	3177p	4581	185	177	179	1665x65	1681-36
6028	179	180	312	2330	6482	180	3177q	4582	186	178	180	1665x66	1681-37
6029	180	181	313	2331	6483	181	3177r	4583	187	179	181	1665x67	1681-38
6030	181	182	314	2332	6484	182	3177s	4584	188	180	182	1665x68	1681-39
6031	182	183	315	2333	6485	183	3177t	4585	189	181	183	1665x69	1681-40
6032	183	184	320	2334	6486	184	3177u	4586	190	182	184	1665x70	1684
6033	184	185	321	2335	6487	185	3177v	4587	191	183	185	1665x71	1684-1
6034	185	186	322	2336	6488	186	3177w	4588	192	184	186	1665x72	1684-2
6035	185	187	323	2337	6489	187	3177x	4589	193	185	187	1665x73	1684-3
6036	187	188	324	2338	6490	188	3177y	4590	194	186	188	1665x74	1684-4
6037	188	189	325	2339	6491	189	3177z	4591	195	187	189	1165x75	1684-5
5482	...	...	1	...	6492	I	...	4592	...	188	...	1665x76	...
5483	189	190	2	2340	6493	I	3178	4592	1	189	...	1665x77	1675
5844	190	191	3	2342	6494	I	3178a	4592	2	190	...	1665x78	1675
5845	191	192	4	2343	6495	I	3178b	4592	3	191	...	1665x79	1675
5846	192	193	5	...	6495	I	3178c	4592	4	192	...	1665x80	1675
5847	193	194	6	2345	6497	I	3178d	4593	5	193	...	1665x81	1675
5848	194	195	7	2344	6498	I	3178e	4594	6	194	...	1665x82	1675
...	197	196	...	...	...	190	...	...	...	...	...	...	1684-7
...	198	196	...	...	...	...	...	...	...	...	...	...	...

Note.—In Alaska, Arkansas, Delaware, Hawaii, Iowa, Kentucky, Louisiana, Mississippi, Nevada, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia and Wyoming, the numbers are the same as in the commissioners' draft column X.

Negotiable Instruments Law

- Article**
1. Short title; definitions (§§ 1, 2).
 2. General provisions (§§ 3-7).
 3. Form and interpretation (§§ 20-42).
 4. Consideration (§§ 50-55).
 5. Negotiation (§§ 60-80).
 6. Rights of holder (§§ 90-98).
 7. Liabilities of parties (§§ 110-119).
 8. Presentment for payment (§§ 130-148).
 9. Notice of dishonor (§§ 160-189).
 10. Discharge (§§ 200-206).
 11. Bills of exchange; form and interpretation (§§ 210-215).
 12. Acceptance (§§ 220-230).
 13. Presentment for acceptance (§§ 240-248).
 14. Protest (§§ 260-268).
 15. Acceptance for honor (§§ 280-289).
 16. Payment for honor (§§ 300-306).
 17. Bills in sets (§§ 310-315).
 18. Promissory notes and checks (§§ 320-326).
 19. Notes given for patent rights and for a speculative consideration (§§ 330-332).
 20. Laws repealed; when to take effect (§§ 340-341).

ARTICLE I**Short Title: Definitions**

Section 1. Short title.

2. Definitions.

§ 1. Short title. This chapter shall be known as the "Negotiable Instruments Law."

Variant.—Same wording as proposed by the Commissioners of Uniformity of Laws and used in most of the states. Several states have inserted the word "uniform" before "negotiable."

The courts of the different states in construing the law seek to follow the original intent of uniformity.

Brown v. Brown, 91 Misc. 220; *State Bank of Halsted*, 162 Iowa, 443; *Tosh v. Crafts*, 193 Mass. 110; *Windsor Cement Co. v. Thompson*, 86 Conn. 511; *First National Bank v. Miller*, 139 Wis. 126; *American Trust Co. v. Conevin*, 184 Fed. Rep. 657; *Smith v. Nelson Land Co.* 212 Fed. Rep. 56; *Schmidt v. Bank of Commerce*, 234 U. S. 64.

While the law has been adopted by practically all the states the courts of one state will not take judicial notice of its adoption in another state without proof of that fact.

Gleason v. Thayer, 87 Conn. 248; *Demelman v. Brazier*, 193 Mass. 589.

§ 2. Definitions. In this chapter, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

The rule is well settled that words having precise and well-settled meaning in the jurisprudence of a country have the same sense in its statutes unless a different meaning is plainly intended.

Perkins v. Smith, 116 N. Y. 441, 23 N. E. 21; *Bell v. Terry*, 163 N. Y. Supp. 733.

Person.—Defined in New York General Construction Law, Sec. 37.

Bearer.—If the maker of a promissory note wrongfully obtains possession of it after it was indorsed in blank by the payee, he is the bearer within the meaning of the statute.

Massachusetts National Bank v. Snow, 187 Mass. 159.

Holder.—*Craig v. Polo Alto Co.*, 16 Idaho 705.

The term "holder in due course" should be construed to apply only to one who takes the instrument by negotiation from another who is holder. It should not include the person to whom it is made payable.

Vander v. VanZuuk, 112 N. Y. (1a.) 807; *Putnam v. Crimes*, 36 Am. Dec. 250.

Delivery.—There is no doubt that a delivery of a note or other obligation to one person in favor of and for the benefit of another, constitutes a valid and binding delivery as against the party who delivers it, whether the party in whose favor it is delivered is the owner of it or not; and for the purpose of protecting his interests, the law holds the party receiving the delivery as his trustee and makes his acceptance of it the acceptance of the beneficiary.

Worth v. Case, 42 N. Y. 362; *Wolfen v. Security Bank*, 170 App. Div. (N. Y.) 521.

The question of delivery is one of fact and each case must stand on its own facts. To constitute delivery it must appear that the maker intentionally surrendered control over it, placing it under the power of the payee or some third person for his use. Depositing it in the mail directed to some person makes delivery complete.

Digan v. Mandal, 167 Ind. 586; Schovl v. Sheidley, 138 Mo. 672; Daggert v. Simonds, 173 Mass. 340; Garrigue v. Keller, 74 N. E. (Ind.) 523; Barrett v. Dodge, 16 R. I. 740; see Sections 34, 35.

Indorsement.—Indorsement is the signature of the payee of a note, bill or check, or that of a third person, written on the back in evidence of his transfer of it, or of his assuring his payment of it or both.

Century Dictionary.

Written.—Writing may be made in ink or pencil. Negotiable instruments like any other contract may be written on parchment, cloth, leather or any other substitute for paper, capable of being transferred from hand to hand. They may be written in any language, and in any form of words. It is enough if the words employed import an absolute engagement to pay a certain sum of money. The signature or indorsement of negotiable paper may be made by a mark.

Brown v. Butchers' Bank, 6 Hill 443; Acme Coal Co. v. Northrop, 146 Pac. 593.

ARTICLE 2**General Provisions**

Section 3. Person primarily liable on instrument.

4. Reasonable time, what constitutes.
5. Time, how computed; when last day falls on holiday.
6. Application of chapter.
7. Law merchant; when governs.

§ 3. **Person primarily liable on instrument.** The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

Variant.—The Kansas statute omits the last sentence.

This section and section 55 was not intended to prevent the courts from determining in equity all questions between an insolvent holder of a note and the one primarily liable for the indebtedness of the instrument as a matter of fact, whether maker or indorser.

Building Engineering Co. v. Northern Bank, 206 N. Y. 400; *Winne v. Winne*, 166 N. Y. 263-271.

A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning and is held ordinarily to know every default of his principal, and is not entitled to notice of dishonor.

Mfg. Co. v. Kimmel, 87 Ind. 566; *Ballard v. Burton*, 16 L. R. A. 667; *Dan. Neg. Inst. Sec.* 1753.

The distinction between primary and secondary liability is well stated and illustrated in *Coleman v. Fuller*, 105 N. C. 328, where it is said that a surety is bound with his principal as an original promisor, but the contract of a guarantor is his own separate contract and a warranty that what is promised by the principal shall be done and not merely an engagement jointly with the principal to do the thing. The surety's promise is to pay a debt, which becomes his own when the principal fails to pay.

See also *Hall v. Weaver*, 34 Fed. Rep. 104; *Hammel v. Beardsley*, 31 Minn. 315; *McIntosh v. Reed*, 89 Fed. Rep. 466; *Kilton v. Tool Co.* 22 R. I. 611.

Liability of accommodation maker.—See notes Sec. 201.

§ 4. Reasonable time, what constitutes. In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

The burden is on the holder of a note, when seeking to charge an indorser to prove due and timely presentment and the giving of notice to the indorser of its dishonor; since the obligation of the indorser is conditional upon all the steps having been taken by the holder which the statute has prescribed as to presentment and as to notice of non-payment.

Commercial National Bank v. Zimmerman, 185 N. Y. 211.

Ordinarily between drawer and drawee, where a check is payable in the same town in which it was given, it should be presented the day of its receipt or the next day.

Deshoutt v. Lewis, 128 App. Div. (N. Y.) 131; *S. B. & N. Y. R. R. Co. v. Collins*, 57 N. Y. 641; *Sulsberger & Sons Co. v. Cramer*, 170 App. Div. 114.

Where demand note was indorsed to plaintiff three months and six days after it was made, the delay in negotiation was not for an "unreasonable length of time" within the meaning of this section, providing that, in determining what is a reasonable time, regard is to be had of the nature of the instrument and the usage of trade in the particular case.

Weber v. Hirsch, 163 N. Y. Supp. 1086. See also *German Am. Bank v. Atwater*, 165 N. Y. 36; *Commercial National Bank v. Zimmerman*, 185 N. Y. 211; *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 273; *Northwestern Coal Co. v. Bowman*, 69 Iowa 153. Notes to Sec. 131.

§ 5. Time, how computed; when last day falls on holiday. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Variant.—The North Carolina statute omits this section.

As banks close on holidays this legislation was necessary in regard to commercial paper.

Walton v. Stafford, 162 N. Y. 562.

Legal Holidays in New York.—The first day of January, known as New Year's day; the 12th day of February, known as Lincoln's birthday; the 22nd day of February, known as Washington's birthday; the 30th

day of May, known as Memorial day; the 4th day of July, known as Independence day; the first Monday in September, known as Labor day; the 12th day of October, known as Columbus day; and the 25th day of December, known as Christmas day; each general election day and such day appointed by the president of the United States and governor as a day of general thanksgiving. The term half-holiday includes the period from noon to midnight of each Saturday, which is not a holiday. Sec. 24 General Construction Law.

Saturday half-holiday.—The holder of a bill or note due and presentable on Saturday may, if he so elects, rest upon the demand and presentment made before noon of that day, and if he does, notice of demand and protest given on that day or the succeeding Monday or next secular day, is good, but if he elects to make demand on Monday and payment is not made, then he must in order to hold the indorser or other parties entitled to notice, protest and give notice of dishonor on that day.

Sylvester v. Crohan, 138 N. Y. 499.

§ 6. Application of chapter. The provisions of this chapter do not apply to negotiable instruments made and delivered prior to October first, eighteen hundred and ninety-seven.

Variant.—The statutes of Arizona and Florida omit this section. The Minnesota statute adds: "Nor shall they be construed as modifying, repealing or superseding any of the terms and provisions of Section 2747, Revised Laws 1905." The South Dakota statute reads: "Nothing in this act contained shall be construed as in any manner repealing Chapters 128, 140 and 141 of the Laws of 1905 and Chapter 74 of the Laws of 1907."

Indorsed after Law, effect of paper made before see,

Gate City National Bank v. Schmidt, 168 Mo. App. 153; Mackintosh v. Gibbs, 81 N. J. L. 37.

§ 7. Law merchant; when governs. In any case not provided for in this chapter the rules of the law merchant shall govern.

Chancellor Kent defines the rules of the law merchant to be "a system of law, which does not rest essentially on the positive institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade, which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world."

All matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of the parties to contract thereto, are determined by the law of the place where the contract is made. All matters connected with its performance, including presentation, notice, demand, etc., are regulated by the law of the place where the contract, by its terms, is to be performed. All matters respecting the remedy to be pursued including the bringing of suits and the service of process, depend upon the law of the place where the action is brought.

Scudder v. Bank, 91 U. S. 406.

ARTICLE 3**Form and Interpretation**

- Section 20. Form of negotiable instrument.
21. Certainty as to sum; what constitutes.
 22. When promise is unconditional.
 23. Determinable future time; what constitutes.
 24. Additional provisions not affecting negotiability.
 25. Omissions; seal; particular money.
 26. When payable on demand.
 27. When payable to order.
 28. When payable to bearer.
 29. Terms, when sufficient.
 30. Date, presumption as to.
 31. Ante-dated and post-dated.
 32. When date may be inserted.
 33. Blanks; when may be filled.
 34. Incomplete instrument not delivered.
 35. Delivery; when effectual; when presumed.
 36. Construction where instrument is ambiguous.
 37. Liability of person signing in trade or assumed name.
 38. Signature by agent; authority; how shown.
 39. Liability of person signing as agent.
 40. Signature by procuration; effect of.
 41. Effect of indorsement by infant or corporation.
 42. Forged signature; effect of.

§ 20. Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

Variant.—The statutes of Arizona, Idaho, Kentucky, North Carolina and Wyoming add the words: "of a specified person" after the word "order", in subdivision 4. The Wisconsin statute the following is added to subdivision 5: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by any officer thereof or any other person, and no obligation nor instrument made by any such corporation, or any officer thereof, unless expressly authorized by law to be made negotiable, shall be, or shall be deemed to be, negotiable according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words, "not negotiable" shall be plainly written, printed or stamped, shall be negotiable as provided in Section 1676 of the Wisconsin statutes of 1878 and in Sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

The character of an instrument cannot be affected by what the parties may choose to call it in their pleadings or otherwise, whether the paper is a bill, note, check or what not is to be determined by the court from the writing thereof.

Buisenthall v. Williams, 85 Am. Dec. 629.

Negotiable is a term applied to a contract, the right of action of which is capable of being transferred by indorsement (of which delivery is an essential part) in case the undertaking is to A, or his order, A, or his agent, or the like, or, by delivery alone, in case the undertaking is to A, or bearer, the assignee in either case having a right to sue in his own name with all the rights of the assignor.

Bills of exchange, promissory notes, government, state, county, township, district, municipal and corporate bonds, and bank notes, to order or bearer, are universally negotiable; and bills of lading, and notes not to order or bearer, are quasi negotiable; that is, an indorsement will give a right of action in the name of the assignee.

Whether a written instrument is negotiable must be determined from the writing itself and cannot depend on extrinsic facts.

Equitable Trust Co. v. Harger, 258 Ill. 615; 102 N. E. 209.

Subd. 1. The word writing includes print. Sec. 2, ante.

The material on which the writing or printing is made is immaterial and may be written on paper, wood, stone or metal.

Danl. Neg. Inst. Sec. 77.

The writing may be with ink or pencil.

Brown v. Butchers' Bank, 6 Hill 443. *Reed v. Roark*, 14 Tex. 329; 65 Am. Dec. 127.

The signature need not necessarily be the full name. Signature by initials or by mark are sufficient, provided it be used as a substitute and he intends to be bound by it.

Dewit v. Wilson, 9 N. Y. 574; *Brown v. Butchers' Bank*, 6 Hill 433; *Merchants' Bank v. Spicer*, 6 Wend. 443.

The place of signature on the instrument is immaterial provided it is signed with the intent to become maker or drawer.

Palmer v. Stephens, 1 Denio 471; *Zerin v. Sterne*, 71 Am. Dec. 204, 474; *Olcott v. Little*, 32 Am. Dec. (N. H.) 357.

A rubber stamp indorsement is valid when made by one having authority.

Mayers v. McRimmon (N. C.), 53 S. E. 447; *Robl v. Pennsylvania Co. (Pa.)*, 40 Atl. 969.

Signature to a check by a bank depositor by mark in lead pencil is valid.

Drefahl v. Security Savings Bank, 107 N. W. (Ia.) 179.

A deposit in the name of one person "or" another is a deposit in the name of both, the same as if the word "and" had been used.

Clary v. Fitzgerald, 155 App. Div. 659.

By Section 144 of the Banking Law of New York (Consol. Laws, Chap. 2; Laws of 1909, Chap. 10), it is among other things provided as follows: "When a deposit shall be made by any person in the names of such depositor and another person and in form to be paid to either or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons upon the making thereof shall become the property of such persons as joint tenants and the same together with all interest thereon shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both or to the survivor after the death of one of them, and such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof."

Equivalent statutory provisions were in 1909 adopted in California (Stats. and Amdts. of 1909, Chap. 76, Section 16) and Michigan (Public Acts of 1909, No. 248, Section 3).

The law recognizes a joint tenancy in personal property, irrespective of whether the tenants be husband and wife, and where there is a joint tenancy the right of survivorship exists.

West v. McCullough, 123 App. Div. 846, 108 N. Y. Supp. 493, affirmed 194 N. Y. 518, 87 N. E. 1130, citing Farrelly v. Emigrant Industrial Savings Bank, 92 App. Div. 529, 87 N. Y. Supp. 54, and Kelly v. Home Savings Bank, 103 App. Div. 141, 92 N. Y. Supp. 578; In re Reynolds Estate, 163 N. Y. Supp. 803.

FORM FOR OPENING "EITHER OR SURVIVOR" ACCOUNT

We, John Rogers and Helen Rogers, do hereby open an account with the Bank, and do hereby authorize, empower and direct the Bank to open an account with us in the name of "John Rogers and Helen Rogers" payable to either or the survivor, or under such other designation as said bank may employ; and we, the said John Rogers and Helen Rogers, do hereby agree with each other to become and be co-partners in the ownership of said moneys and all accrued and accruing interest thereon and of all moneys hereafter to be deposited to the said account. And it is agreed that each and either of said parties and the survivor of them may at any and all times draw and receive from said bank the whole or any part of said moneys and accumulated interest; and each of said parties is authorized and empowered to sign the name of the other to any receipt, check, draft or other voucher for the moneys so drawn.

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Subd. 2. A simple I. O. U. is not usually a promissory note unless those words are added showing it to be absolutely payable.

Gay v. Rooke, 151 Mass. 115.

An instrument worded "Due A \$100, payable on demand" and signed is a promissory note.

Kimball v. Huntington, 10 Wend. 675.

A savings bank pass book is not negotiable paper, and its possession constitutes in itself no evidence of a right to draw money thereon.

White v. Cushing, 88 Me. 339; Crawford v. West Side Bank, 100 N. Y. 51; Smith v. Brooklyn Savings Bank, 101 N. Y. 60; Iron City Bank v. McCord, 139 Pa. St. 52.

A paper reading "As per verbal agreement we hereby agree to pay you \$1,000 ninety days from date, this amount to be paid out on our profits on job," not being an unconditional promise or order to pay a sum certain in money, and not being payable to bearer or order is not a negotiable instrument.

Fulton v. Varney, 117 App. Div. 572.

A certificate of deposit issued by a bank whereby it agrees to pay to the person named therein "or her assigns" a certain sum of money is not a negotiable instrument within the meaning of this section.

Zander v. N. Y. Security & Trust Co., 178 N. Y. 208.

A certificate of deposit payable to the order of the depositor, in current bank notes, was held negotiable.

Pardee v. Fish, 60 N. Y. 265.

A note is not rendered non-negotiable by the fact that it provides for a discount, providing it is paid before maturity.

Farmers' Trust Co. v. Planck, (Neb.) 152 N. W. 390.

In *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722, it is held that a note providing for a discount of 6 per cent., if the debt is paid on or before maturity, does not make the instrument non-negotiable, as the amount of the deduction is readily ascertainable from the face of the paper.

As to what constitutes money.—In most of the states it is held that bills payable in merchandise or anything but money are not good bills of exchange, but the cases are not agreed in all respects as to what shall be deemed as money.

In *Klauber v. Biggerstaff*, 47 Wis. 551, the court defining money said, "Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and the equivalent of coin. By universal consent, under the sanction of all courts, everywhere, or almost everywhere, bank notes lawfully issued, actually current at par in lieu of coin, are money. The common term paper money is in a legal sense quite as accurate as the term coined money."

The general rule is that the term "currency" and "current funds" when used as the expression of the medium of payment should be construed to mean current money, when thus construed an instrument payable in currency or current funds is in this respect negotiable.

Bank of Dexter, 94 Me. 348; *Howe v. Hartness*, 11 Ohio St. 449; *Black v. Ward*, 27 Mich. 191.

Where a bill was drawn in Montreal on a business firm in Whitehall, payable in New York City in gold dollars, it was held to be a negotiable instrument upon the ground that at the time (1870) there were two kinds of lawful money in use under Acts of Congress, and as gold and silver were recognized as money current in business and as legal tender by the statute, it was decided that a person might be permitted to select that description of money recognized by law without destroying the negotiability of the instrument.

Crystler v. Renois, 43 N. Y. 209; *Van Alstyne v. Sorley*, 32 Texas 518.

In Michigan a note payable in "Canada currency" was held to be negotiable.

Black v. Ward, 27 Mich. 193; 15 Am. Rep. 162.

In Texas a note payable in "Mexican silver dollars" was held to be negotiable.

Hogus v. Williamson, 85 Texas 553, reported with notes in 20 L. R. A. 481.

In order to be negotiable a promissory note must be payable either in specie or funds which the court can judicially notice as equivalent here for money. Held therefore that a note payable in "Canada money" was not negotiable.

Thompson v. Sloan, 23 Wend. 71; also see Jones v. Fales, 4 Mass. 245.

The words "as per contract" written on the back of a note at the time of its execution, under which the payee indorses at the time of the negotiation, do not affect the negotiability of the note.

Snelling State Bank v. Clasen, (Minn.) 157 N. W. 643; First National Bank v. Lightner, 74 Kan. 736; 118 Am. St. Rep. 353.

"New York or Chicago exchange" are negotiable.

Security Trust Co. v. Des Moines Co., 198 Fed. 331.

The Courts however, are not unanimous and the safer rule to adopt for the bank where such note is offered for discount, is to proceed on the theory that it might be held non-negotiable.

See Chandler v. Calvert, 87 Mo. App. 362; Hogue v. Edwards, 9 Ill. App. 153.

The following are illustrations of provisions which have been held not to render the instrument objectionable on the ground of uncertainty as to amount.

A discount of 6% will be given if the full amount of this instrument is paid at maturity of the first installment.

Harrison v. Hunter, Tex. 168 S. W. Rep. 1036.

A discount of 6% will be allowed if paid in full within fifteen days from date. Installments after maturity draw 6 per cent. interest.

First National Bank v. Watson, Okla., 155 Pac. Rep. 1152.

With interest at eight per cent. payable annually from November 1, 1905, until paid. Interest from date if not paid when due. (Note dated May, 1905; payable November 1, 1905.)

Security Trust & Savings Bank v. Gleichman, Okla., 150 Pac. Rep. 908.

Non-payment of any installment for more than thirty days after maturity renders remaining installments due at holder's option.

Harrison v. Hunter, Texas, 168 S. W. Rep. 1036.

If default is made in the payment of any note or the machine is levied upon or undersigned attempts to sell or remove the same, said

company may declare all the notes due. (Series of notes for threshing machine.)

Schmidt v. Pegg., 137 N. W. 524.

If suit is begun judgment may be taken for an additional \$15.00 and ten per cent. of the amount due for attorney's fees.

Seton v. Exchange Bank, Okla., 150 Pac. Rep. 1079.



LINCOLN SAVINGS BANK 21-22

LOUISVILLE, KY.

Aug. 1 1917

Pay to

Edward B. Lee

or bearer \$360.00

Three hundred and sixty no/100 Dollars
or the amount due on my deposit
book no. 18,972

Charles A. McDonald

This check is drawn on a special fund and is not as required by Sec. 20, Subd. 2 for "a certain sum of money" and is therefore non-negotiable. The courts in all the states, as well as the statute (Section 22) make it entirely clear that the mere indication of a particular fund from which the maker of an instrument may reimburse himself, or a mere reference to a specified account which is to be debited with the amount called for by the instrument, does not affect its unconditionality, and it is only where the order or promise is only to pay out of a particular fund that it is considered conditional in such a sense as to destroy the negotiability of the instrument.

Hibbs v. Brown, 190 N. Y. 195; Brill v. Tuttle, 81 N. Y. 454; Ehricks v. De Mill, 75 N. Y. 370; Alger v. Scott, 54 N. Y. 14; Parker v. City of Syracuse, 31 N. Y. 376.

Subd. 3. An option to declare the principal due upon default in payment of interest does not affect the negotiable character of the instrument.

Bank v. Garland, 160 Ill. App. 407.

In *Leader v. Plants*, 95 Me. 339, a promissory note was made payable "within one year after date" and it was held to be negotiable; that the option to pay did not destroy its negotiability.

See also *Bowie v. Hume*, 13 App. D. C. 286; *Louisville Banking Co. v. Gray*, 123 Ala. 251; *Ackley School v. Hall*, 113 U. S. 135; *Mattison v. Marks*, 31 Mich. 421. But see *Mahoney v. Fitzpatrick*, 133 Mass. 151.

In *Cunningham v. McDonald*, 98 Texas 316, it was held, "A promissory note is not rendered negotiable by the fact that the maker, promising

to pay by a day certain, reserves to himself by its terms the right to pay sooner."

A note payable when dividends shall be declared is not negotiable.

Brocks v. Hargreaves, 21 Mich. 254. Or from profits of machines when sold. *Benedict v. Cowden*, 49 N. Y. 396. Or when mill is sold. *Blake v. Coleman*, 22 Wis. 415.

A note containing the provision "It is understood that this note will be renewed at maturity" renders the time of payment uncertain.

Citizens Bank v. Piolet, 126 Pa. St. 192. But in *Witty v. Mutual Insurance Co.* 123 Ind. 411, containing a similar provision, was held to be negotiable.

A note payable ninety days after date, which contains the following stipulation, "This note is payable when Post Office Department accepts my building for me," is not negotiable.

Devine v. Price, 152 N. Y. Supp. 321.

A note providing that the payee may declare it due at any time he deems it to be insecure is non-negotiable.

Reynolds v. Vint, Oregon, 144 Pac. Rep. 526.

A note payable six months after the maker's death is negotiable.

Deeter v. Burk, 107 N. E. Rep. 304.

Subd. 4. Bonds issued by a joint stock association payable to bearer, unless the holder prefers to have them registered, in which case they are not to be transferred except on the books of the company, and also coupons attached thereto payable to bearer, are negotiable.

Hibbs v. Brown, 112 App. Div. (N. Y.) 214.

"Holder" is of the same import as "bearer" and a note payable to a specified person or "holder" is negotiable the same as if "bearer" had been used.

Putnam v. Crimes, 36 Am. Dec. 250.

\$4,192.50.

Zanesville, Ohio, February 12, 1907.

"Four months after date we or either of us promise to pay to the Old Citizens' National Bank of Zanesville, Ohio, four thousand one hundred ninety-two and 50/100 dollars, value received, payable at said bank with interest at 6 per cent. per annum."

No. 17319. Due June 12.

J. E. BLACKBURN,
ELMER DOVER,
J. B. OWENS.

The foregoing note not being payable to bearer or order, is non-negotiable. (*Kerr v. Smith*, 156 App. Div. 807, 142 N. Y. Supp. 57;

National Citizens' Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1), and there would therefore be no presumption of consideration; but the recital "value received," in the body of the note, constitutes an admission that the instrument was issued for a sufficient consideration (*Prindle v. Caruthers*, 15 N. Y. 425; *Hamilton v. Hamilton*, 127 App. Div. 871, 112 N. Y. Supp. 10, cited with approval in *National Citizens' Bank v. Toplitz*, 178 N. Y. 464, 71 N. E. 1).

The three makers in the foregoing note were liable to the payee both jointly and severally, but presumptively as between themselves, their liability was joint, and equity requires that they bear the burden equally, and that those who have not paid shall contribute to the plaintiff, who has been obliged to pay the entire amount for which all three makers were liable.

Aspinwall v. Sacchi, 57 N. Y. 331; *Hard v. Mingle*, 141 App. Div. (N.) 170, affirmed 206 N. Y. 179; *Dillenbeck v. Dygert*, 97 N. Y. 303; *McCready v. Van Antwerp*, 24 Hun. 322, 51 App. Div. (N. Y.) 616; *Owens v. Blackburn*, 146 N. Y. Supp. 966.

An agreement made between two persons or where one agrees to pay the other a certain sum of money is not payable to order or to bearer as required in this section.

Fulton v. Varney, 117 App. Div. (N. Y.) 572; *Owen v. Blackburn*, 161 App. Div. (N. Y.) 827; *Backus v. Danforth*, 10 Conn. 297; *Gilley v. Harrell*, 118 Tenn. 115.

An instrument by which the signer agrees to pay a specified sum of money at a time and place named, but not stating that it is to be paid to any person or bearer, is not negotiable and the indorser cannot be sued upon it as such.

Hilborn v. Pennsylvania Cement Co., 145 App. Div. 442.

"One day after death for value received promise to pay to S. J. Porter the sum of \$318 and attorneys' fees, negotiable and payable at the Union Bank of Tipton, Indiana, with interest at the rate of 6 per cent. per annum from date until paid."

This instrument must be held to be a negotiable note. If a note does not contain the words "or order," or "or bearer" or other like words of negotiability, it is non-negotiable. (*Tiedeman Commercial Paper*, 21; *Maule v. Crawford*, 14 Hun (N. Y.) 193; *Hackney v. Jones*, 3 Hump. (Tenn.) 612.) But if it contains words which clearly show that it was intended to be negotiable, it is not necessary that the words "order" or "bearer" be used. It is clearly stated that this note shall be "negotiable

and payable at the Union Bank at Tipton, Indiana," and therefore it must be held to be a negotiable instrument. (Tiedeman, Commercial Paper, Sec. 21; Raymond v. Middleton, 29 Pa. 530.)

Essig v. Porter. (Ind.) 112 N. E. 1005.

Order on savings bank, when non-negotiable.

Smith v. Brooklyn Savings Bank, 101 N. Y. 58; White v. Cushing, 51 Am. St. Rep. 402.

The absence of the words "order" or "bearer" does not render the paper non-transferable or non-assignable. Their effect is to make it negotiable and cut off defenses against bona fide holders.

Mackin v. Blalock, 133 Ga. 550; 66 S. E. Rep. 265.

A negotiable instrument need not be drawn payable to any named individual, but may be payable to bearer generally. The indorsement by the holder of such paper is not necessary.

McIntosh v. Little, 26 Minn. 336. See also notes to Secs. 23, 27 and 28; Equitable Trust Co. of N. Y. v. Were, 74 Misc. 469; Hilborn v. Pennsylvania Cement Co., 145 App. Div. (N. Y.) 443; Equitable Trust Co. v. Taylor, 146 App. Div. (N. Y.) 424; Gilbert v. Adams, 146 App. Div. (N. Y.) 864; Maule v. Crawford, 14 Hun. (N. Y.) 193; Raymond v. Middleton, 29 Pa. 530.

FOR COUNTER USE ONLY

St. Louis, July 16, 1917

THE NATIONAL BANK OF COMMERCE IN ST. LOUIS 4-26


PAY TO MYSELF ONLY AND CHARGE TO MY ACCOUNT

Ninety five \$ 95.00

THE RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED

NOT NEGOTIABLE

Chad H. Redfern



This check by its terms is payable to the maker only and not payable to bearer or order. The National Bank of Commerce can pay the proceeds to Redfern. It not being payable to order or bearer is not negotiable.

Kinsella v. Lockwood, 79 Misc. 619.

§ 21. Certainty as to sum; what constitutes. The sum payable is a sum certain within the meaning of this chapter although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon

default in payment of any instalment or of interest, the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Variant.—The statutes of Iowa, Idaho, North Carolina and Wyoming omit the words "or of interest" in Subd. 3. The Nebraska statute adds a proviso to Subd. 5 as follows: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment or an instrument made in this state any sum for attorney's fees or other costs." The North Carolina statute adds an additional subdivision as follows: "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of a homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provision in such instrument shall not affect the other terms of such instruments or the negotiability thereof." The South Dakota statute substitutes the following for Subd. 5: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment or an instrument made in this state any sum for attorney's fees, or other costs now taxable by law."

Subd. 1. Agreement to pay interest is a mere incident and does not affect the negotiability of the instrument.

President, etc. v. Hurin, 9 Johns 217; *Baumlistter v. Kuntz*, 53 Fla. 340; *Dinsmore v. Duncan*, 57 N. Y. 573.

Subds. 2-3. The negotiability of notes payable by installment has been well established.

Goshen, etc. v. Hinton, 9 Johns, 217; *Wright v. Irwin*, 33 Mich. 32; *Bright v. Offield*, 81 Wash. 442; *Hodge v. Wallace*, 129 Wis. 84.

Subd. 4.—This section settles all doubt as to this much mooted question.

Second National Bank v. Basuier, 65 Fed. Rep. 58; *Pardee v. Fish*, 60 N. Y. 265; *Whittle v. National Bank*, 26 S. W. Rep. 1106.

Subd. 5.—The rule that a stipulation for attorney's fees does not effect the negotiability of the instrument containing it is a much mooted question. In the case of *Raleigh County Bank v. Poteet*, L. R. A. 1915 B, 928 gives a general review of the decisions of all the states upon this subject and contains a statement of the reasons given by the various courts in upholding and rejecting the provision. In the case of *Boozar v.*

Anderson, 42 Ark. 167, it was said that the provision for payment of attorney's fees was an agreement for a penalty, and that the courts of that state would not enforce it. The same rule has been reaffirmed in subsequent cases of Arden Lumber Co. v. Henderson, 83 Ark. 244, 103 S. W. 185, and White Co. Egelhoff, 96 Ark. 105, 131 S. W. 208.

See also, First National Bank v. Fleitmann, 168 App. Div. (N. Y.) 75; Dorsey v. Wolff, 142 Ill. 589; Stoneman v. Pyle, 35 Ind. 103; Shenandoah Bank v. Marsh, 89 Iowa 173; Bowie v. Hall, 1 L. R. A. 546; Jones v. Rodetz, 27 Minn. 240; First National Bank v. Gay, 63 Mo. 38; Woods v. North, 84 Pa. St. 410; National Bank v. Sutton, 6 U. S. App. 312; Farmers' National Bank v. Sutton, 6 U. S. App. 331.

§ 22. When promise is unconditional. An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

This section defining an unconditional promise to pay embodies the rules of common law and law merchant as they have been established before the enactment of the statute.

Subd. 1.—In Lowery v. Steward, 25 N. Y. 239, the order read, "Please pay to the order of Archibold H. Lowery the sum of \$500, on account of 24 bales of cotton shipped to you as per bill of lading by steamer Colorado, inclosed to you in letter."

In Parker v. City of Syracuse, 31 N. Y. 376, the order was drawn on the comptroller of the city as follows: "Pay Parker & Wright \$1,400 on plank road and sidewalk account and charge to my account. A. L. Schofield."

In Alger v. Scott, 54 N. Y. 14, the order was drawn by a landlord upon his tenant in the following terms: "Please pay John R. Glover \$346.69 and charge same to me, account of rent of house No. 13 Cheever Place."

In Brill v. Tuttle, 81 N. Y. 454, an order was given reading, "Pay Brill and Russell \$300 and charge the same to our account for labor and material performed and furnished in the repair and alteration of the house in which you reside in the village of Mohawk."

The tendency of the courts is to construe commercial instruments having on them a memorandum or reference to dealings between the parties as negotiable, if they, in other respects, have all the characteristics of negotiability.

Waterbury-Wallace Co., Inc., v. Ivey, 163 N. Y. Supp. 719.

In determining whether the reference to the contract destroyed the negotiability of the note, we are compelled to confine our examination to the note itself.

Schmittler v. Simon, 101 N. Y. 554, 559, 5 N. E. 452, 54 Am. Rep. 737; *National Bank of Newbury v. Wentworth*, 218 Mass. 30, 105 N. E. 626. It was said in the *Schmittler Case*, 101 N. Y. 560, 5 N. E. 455, 54 Am. Rep. 737, that:

"The mere mention of a fund in a draft does not necessarily deprive it of the character of commercial paper; but it must further appear, in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise. The question, therefore, to be determined here, is whether the fund in question is referred to as the measure of liability or the means of reimbursement."

The rule would seem, therefore, to go much farther in supporting negotiability than it is necessary to go in the present case, as there is no reference to a fund or other means of payment.

The tendency of the courts is to construe commercial instruments having on them a memorandum or reference to dealings between the parties as negotiable, if they in other respects have all the characteristics of negotiability.

Schmittler v. Simon, supra, 101 N. Y. at page 561, 5 N. E. 452, 54 Am. Rep. 737; *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108. There are many cases in the books where it has been held that additional writings upon a note or bill have destroyed negotiability, but it will be found upon examination that the ruling invariably rested upon a determination that the language there present showed that the maker or drawer clearly intended to charge a specified fund, and not to go beyond that. The closest cases we have found, are *National Bank of Newbury v. Wentworth*, supra, and *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661. In the *Bank Case* the words "as per terms of contract" followed the words "value received" at the end of the note. In the *Taylor Case* the note was given by an assured in payment of a premium, and bore upon it the words "on policy No. 33,386." In both cases it was held that the words claimed to have the effect of destroying negotiability were mere references to the transactions out of which the notes grew, and that the instruments were negotiable. In the *Taylor Case* the court said (109 Mass. at page 37, 12 Am. Rep. 661):

"The words quoted in these notes do not express any contingency as to the payment of the notes, or refer to any fund out of which they are to be paid, but appear to refer to the consideration for which they were given. Such a reference may be for mere convenience, or for any other reason; but it cannot be interpreted as a modification of the promise. Even if the policy contains a provision for a set-off in case of loss, this does not make the payment of the note contingent upon the happening of no loss; for the language referred to does not express any such contingency."

In *National Bank v. Wentworth*, the court said (218 Mass. at page 32, 105 N. E. at page 627):

"But, while the defendant [maker] doubtless intended to guard against the payment of money for which in the future he did not receive an equivalent, and the payee has gone into bankruptcy, the language used does not affect the payment of the amounts shown by the notes."

In both of these Massachusetts cases the court points out that the ruling would have been different, had the questioned language been such as "subject to" the contract, or the policy, as the case might be, citing cases where reference in such form was held to create restriction of payment.

See also, *First National Bank v. Lightner*, 74 Kan. 736; *Nichols v. Ruggles*, 76 Me. 27; *Whitney v. National Bank*, 137 Mass. 351; *Hibbs v. Brown*, 112 App. Div. (N. Y.) 219; *Fulton v. Varney*, 117 App. Div. (N. Y.) 572; *Bull v. Simms*, 23 N. Y. 570; *Oatman v. Taylor*, 29 N. Y. 649; *Schmitter v. Simon*, 114 N. Y. 176; *Hibbs v. Brown*, 190 N. Y. 167; *Chicago R. R. Co. v. Merchants Bank*, 136 U. S. 268; *Equitable Trust Co. v. Taylor*, 146 App. Div. (N. Y.) 424; *Gilbert v. Adams*, 146 App. Div. (N. Y.) 864; *Schmitter v. Simon*, 101 N. Y. 554; *Brill v. Tuttle*, 81 N. Y. 454; *Parker v. City of Syracuse*, 31 N. Y. 376.

Payment out of a particular fund.—This expression is the same as found in many of the cases "drawn on the general credit of the drawer."

Waddell v. Hanover Bank, 48 Misc. 578; *Fulton v. Varney*, 117 App. Div. (N. Y.) 572; *Hibbs v. Brown*, 190 N. Y. 167.

The mere mention of a fund in a draft does not necessarily deprive it of the character of negotiable paper; it is only where there is a direction expressed or implied, to pay it from the fund, and not otherwise, that it will have that effect.

Schmitter v. Simon, 101 N. Y. 554; *Munger v. Shannon*, 61 N. Y. 255; *Redmond v. Adams*, 51 Me. 429; *Coursen v. Ledder*, 31 Pa. St. 506.

An order upon a savings bank for a certain sum of money, made chargeable to the drawer's account, but with the printed words "the

bank book of the depositor must accompany this order" upon the face of the order, below the signature of the drawer is not a negotiable instrument.

White v. Cushing, 51 Am. St. Rep. 402, 88 Me. 339.

Where reference is made to a special fund merely as a direction to the drawee how to reimburse himself, and the payment is not made to depend upon the adequacy of the fund it will not vitiate the bill.

Edward on Bills and Notes, 158; *Munger v. Shannon*, 61 N. Y. 255; *Brill v. Tuttle*, 81 N. Y. 457.

Subd. 2.—The insertion of a memorandum explaining the nature of the business for which the bill or note was given will not make it non-negotiable, as such memorandum does not make the payment conditional.

Tiedman Commercial Paper, 26; 4 Am. & Eng. Ency. of Law 89; *Rigely v. Bank*, 109 Ill. 479, 54 L. R. A. 827.

The following instruments have been passed upon by the Courts and held to be negotiable:

"On account of contract."

First National Bank v. Lightner, 74 Kans. 736, 88 Pac. Rep. 59.

"Value received as per contract."

National Bank of Newberry v. Wentworth, Mass., 105 N. E. Rep. 626.

"For payment under contract of even date."

Slaughter v. Bank of Bisbee, Ariz., 154 Pac. Rep. 1040.

"Pay to the order of Wm. H. Deweese, atty., \$1,150.76 (eleven hundred and fifty and 76-100) in full for A. J. Kenney mortgage. To Denton National Bank, Denton, Maryland. Oscar Clark."

Denton National Bank v. Kenney, Md. 81 Atl. Rep. 227.

"Having been cause of a money loss to my friend, I have given her three thousand dollars. I hold this amount in trust for her and one year after date or thereafter on demand, I promise to pay to the order of Jane Doe, her heirs or assigns, three thousand dollars with interest."

Hickok v. Bunting, 86 Supp. 1059, 92 App. Div. 167.

"Two years after date we promise to pay to the order of Howard Hazlett, trustee, thirty-five thousand and twenty-one dollars with interest from date until paid, at the rate of 6 per cent. per annum, in part payment for land in Logan and Boone Counties, and upon which a lien has been reserved to secure this note, payable at the National Exchange Bank, Wheeling, W. Va."

Dollar Savings & Trust Co. v. Crawford, W. Va., 70 S. E. Rep. 1089.

See also, *Nichols v. Ruggles*, 76 Me. 25; *Bank v. Mitchell*, 96 N. C. 53; *Shepard v. Abbott*, 137 Mass. 224; *Bank v. Lightner*, 88 Pac. (Kan.) 59.

note, it is further agreed by the undersigned that, in case of depreciation in the market value of the securities herewith or hereafter pledged to secure this note, the undersigned will deposit and pledge with said bank such additional security as it may from time to time require and in default of such deposit and pledge for three days after notice to make the same shall be given to or left at the place of business of the undersigned, this note, at the option of the bank, shall become due and payable."

Finley v. Smith, 165 Ky. 445, 177 S. W. Rep. 262.

"Six months after death I promise to pay Clyde D. Burke from my estate and through my administrator one thousand dollars, 6 per cent. interest from maturity."

Deeter v. Burk, Ind., 107 N. E. Rep. 304. (1914)

The three following notes were held to be non-negotiable on the ground that they were not payable at a fixed or determinable future time.

"Said C. E. Reynolds (payee) or his agents have full power to declare this note due and take possession of the said automobile for which it is given when they deem themselves insecure even before the maturity of the note."

Reynolds v. Vint, Oregon, 144 Pac. Rep. 526.

"The makers and indorsers of this note hereby severally waive presentment for payment, notice of payment, protest and notice of protest and all exemption that may be allowed by law, and valuation and appraisal laws waived, and each signer and indorser makes the other an agent to extend the time of this note."

Rossville State Bank v. Heslet, Kans., 113 Pac. Rep. 1052.

A promissory note which provided that the payees "are hereby fully authorized and empowered to declare this note due any time they may feel insecure even before the maturity of the note," is non-negotiable because of uncertainty as to time of payment.

Western Machine Co. v. Burnett, 161 Pac. 184; *Reynolds v. Vint*, 144 Pac. (Or.) 526.

A note containing a provision that the title of the property for which it was given should remain in the payee, and that he should have the right to declare the amount due and take possession of the property whenever he may deem himself insecure "even before maturity of the note" is not negotiable.

Kimball v. Studebaker, 94 Pac. (Id.) 1039.

Subd. 2.—A note payable at a fixed date with the proviso "When contract is completed and satisfactory" is not payable on the date mentioned unless all the other conditions have been fulfilled.

11 L. R. A. 748 with notes; *Stultz v. Silva*, 119 Mass. 139; *First National Bank v. Skeen*, 101 Mo. 683; *Home Bank v. Drumgoole*, 109 N. Y. 67.

Municipal bonds issued under a statute providing they should be payable any time before due, are negotiable. While the holder could not exact payment before the day fixed in the bonds: yet by their terms, they were payable at a time which must certainly arrive.

Fisher v. O'Hanlon, 93 Neb. 529; See also, *Holliday State Bank v. Hoffman*, 85 Kan. 71; *Hibernia Bank v. Dresser*, 132 La. 532; *Bright v. Oldfield*, 81 Wash. 442; *Thorpe v. Mindeman*, 123 Wis. 149.

Where one, whose notes were discounted by a bank, signed an agreement containing a list of his assets and liabilities and providing that, if such statement proved false in any respect or in case of his insolvency the notes should immediately become due, the bank might declare the notes due, and set off the maker's deposit against them, even though it did not discover the maker's insolvency until after his death.

Paoli v. East River National Bank, 155 N. Y. Supp. 245.

To constitute a valid promissory note, it must be for the payment of money at some fixed time, or upon some event which must inevitably happen, and that its character as a promissory note cannot depend upon future events, but solely upon its character when created.

Chicago Ry. Equipment Co. v. Merchants Bank, 136 U. S. 268; See Sec. 320.

The negotiable quality of a promissory note, on or before a fixed day, is not destroyed by a provision that the maker and indorsers severally waive presentment and notice of protest, and consent that the time of payment may be extended without notice.

Pomeroy v. Buttery, 116 N. W. 341; 16 L. R. A. (N. S.) 878.

The reservation in a note of the right to pay it before maturity in certain specified installments does not render it non-negotiable. The object of the law in requiring certainty as to the time of payment is to give to negotiable paper as far as possible the quality of a circulating medium like money, and practically to make it represent money, is fully met in a note in such form.

Riker v. Sprague, 14 R. I. 402, 51 Am. Rep. 413.

A note containing the provision that it may be renewed at maturity is not negotiable for the reason that it is not an absolute unconditional contract to pay the amount at maturity.

Citizens Bank v. Piolett, 126 Pa. St. 194.

Subd. 3.—An instrument by which the signer agrees to pay a sum certain at a specified time after his death is a valid promissory note; death being a contingency which is sure to happen.

Cartwright v. Gray, 127 N. Y. 92; See also, *Bristol v. Warner*, 19 Conn. 7; *Shaw v. Camp*, 160 Ill. 425; *Hegeman v. Moon*, 131 N. Y. 462; *Root v. Strang*, 77 Hun. 14; *Gilbert v. Adams*, 146 App. Div. (N. Y.) 864; *Beatty v. Western College*, 117 Ill. 280.

The words "upon the return of this receipt," do not make it payable upon a contingency, or constitute a condition precedent to any payment.

Frank v. Wessels, 64 N. Y. 158.

Where certain coupons cut from railroad bonds were subject to the condition that the time of payment could be changed from time to time at the option of a majority of holders of the series of bonds simultaneously issued therewith, it would deprive them of one of the essential characteristics of negotiable paper.

McClellan v. Norfolk R. R., 110 N. Y. 476.

A note payable to A "when he is twenty-one years of age" is not a negotiable promissory note, it not being certain that he will ever reach that age.

Rice v. Rice, 43 App. Div. (N. Y.) 458; *Kelly v. Hemmingway*, 13 Ill. 604.

A note which states that it is payable to the order of the payee, at a certain fixed time, and states that it is one of a series of notes given for cars sold by the payee to the maker, and is to become due upon the failure to pay any one of the series, and that it is agreed that the title of the cars shall remain in the payee until all the notes are paid, is a valid negotiable promissory note.

Chicago Ry. Equipment Co. v. Merchants' National Bank of Chicago, 130 U. S. 268; See also, *Berneson v. London Insurance Co.*, 201 Mass. 172.

An order, "Forty days after date pay to the order of A \$1,500, and charge same to account of contract. On account of contract when completed and satisfactory" is not a bill of exchange absolutely payable at the end of forty days, whether the contract was completed or not.

Home Bank v. Drumgoole, 109 N. Y. 63.

Subd. 4.—A series of notes payable at different times, but all to become payable on the default in the payment of one, are negotiable.

White v. Thatcher, 188 S. W. Rep. 61.

§ 24. Additional provisions not affecting negotiability.

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Variant.—The Illinois and Wisconsin statute add to end of the saving clause the words: “or authorize the waiver of exemptions from the execution.”

The Illinois statute also omits the words: “if the instrument be not paid at maturity” in Subdivision 2. The Kentucky statute omits Subdivision 3.

An instrument providing for the payment of a certain sum of money and the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, is not a bill or note.

Dorsey v. Wolff, 142 Ill. 589; Holiday v. State Bank, 116 Pac. (Kan.) 239.

Subd. 1.—Where the maker of an instrument in the form of a promissory note, states therein that bonds have been deposited as collateral security with a certain person, and gives authority to sell the same upon non-payment of the note at maturity, and apply the proceeds to the payment of the note; *held* to be negotiable.

Arnold v. Rock River R. R., 5 Duer 207; Collins v. Bradbury, 64 Me. 37.

The law seems to be settled that although it may appear on the face of the note that its payment is secured by collateral in personal property, yet if otherwise in proper form, it is negotiable.

Heard v. Dubque Co. Bank, 8 Neb. 10; See also, Kennedy v. Broderick, 216 Fed. Rep. 137; Biegler v. Merchants' Trust Co., 62 Ill. App. 560; Holliday State Bank v. Hoffman, 85 Kan. 71; Towe v. Rice, 122 Mass. 67; Costello v. Crowell, 127 Mass. 293; Collins v. Bradbury, 64 Me. 37; Perry v. Biglow, 128 Mass. 129.

Subd. 2.—A note authorizing a confession of judgment whether due or not is not negotiable, for the reason that the time of payment is uncertain, depending upon the whim of the holder.

Wisconsin Baptists, etc. v. Bobler, 115 Wis. 289; First National Bank v. Russell, 124 Tenn. 618; Dan. Neg. Inst. Sec. 61 and cases collected.

Statutory construction of this Subdivision renders an instrument authorizing judgment before maturity non-negotiable.

Bank of Elgin v. Russell, 139 S. W. (Tenn.) 618.

Subd. 3.—See Zimmerman v. Anderson, 67 Pa. St. 421; Zimmerman v. Rote, 75 Pa. St. 188; Holliday State Bank v. Hoffman, 85 Kan. 71.

The clause waiving all defenses on the ground of extension of time has been held not to destroy the negotiability of the note. First National Bank v. Buttery, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 52; National Bank of Commerce v. Kenney, 98 Tex. 293, 83 S. W. 368; Jacobs v. Gibson, 77 Mo. App. 244; City National Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123; Farmer, Thompson & Helsell v. Bank of Graettinger, 130 Iowa 469, 107 N. W. 170; Stitzel v. Miller, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004, Ann. Cas. 1912B, 412; Navajo County Bank v. Dolson, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787; Missouri-Lincoln Trust Co. v. Long, 31 Okl. 1, 120 Pac. 291; De Grot v. Focht, 37 Okl. 267, 131 Pac. 172; Longmont National Bank v. Loukonen, 53 Colo. 489, 127 Pac. 947, Ann. Cas. 1914B, 208.

Subd. 4.—Provision for the payment in "cash or goods on demand" being optional with the holder to accept cash or goods is negotiable.

Hostatter v. Wilson, 36 Barb. 307.

An instrument providing for payment of money or stock negotiable for the same reason.

Hodges v. Shuler, 22 N. Y. 116.

§ 25. Omissions; seal; particular money. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Variant.—The Illinois statute, Subdivision 5, reads as follows: "Is payable in currency or current funds, or funds, or designates a particular kind of current money in which payment is to be made." The Illinois statute also omits the saving clause.

Subd. 1.—The date of a check or note is only presumptive of the time it was issued. A check or note has no inception until delivery, and for all legal purposes it is to be considered as made on the date it is delivered.

Cowing v. Altman, 71 N. Y. 411; Church v. Stevens, 56 Misc. 572; Bigge v. Piper, 86 Tenn. 589; See Section 35.

It is the general rule that where the words indicative of the time of payment are omitted as "one after date" so that on the face of the instrument no time of payment is specified, the omission may be supplied by the holder and such alteration will not vitiate the paper. See notes Sec. 33.

Nichols v. Frothingham, 45 Me. 220.

Subd. 2.—The omission of the words "for value received" in a note is not material.

Underhill v. Phillips, 10 Hun. 591; Dan. Neg. Inst. Sec. 108.

The production of a note and proof of defendant's signature make a *prima facie* case for plaintiff, but the burden of proof still remains upon the plaintiff to prove consideration, and if there is any evidence upon this on behalf of the defendant, plaintiff must show, upon a preponderance of the whole evidence that there was a valuable consideration.

Durland v. Durland, 153 N. Y. 67; See also, Dan. Neg. Inst. Sec. 164; Bruyn v. Russell, 52 Hun. 17; Brown v. Russell, 60 Hun. 280; Simpson v. Davis, 119 Mass. 269; Perly v. Perly, 144 Mass. 104; See Consideration Art. 3.

"Due Kimball & Kenston \$325, payable on demand, is a promissory note within the statute. Neither the acknowledgement of value received or negotiable words are essential.

Carnwright v. Gray, 127 N. Y. 97; Carver v. Hayes, 47 Me. 257.

Subd. 3.—Where the maker of a promissory note removes from the state and continues to reside abroad until its maturity, the indorser may be charged without a demand of such maker or presentment at his last place of residence in the state.

Foster v. Julian, 24 N. Y. 28; Adams v. Leland, 30 N. Y. 309; Anderson v. Drake, 14 Johns 114.

On the principle that neither the date nor place is essential, see *Dan. Neg. Inst.* Chapter 3, Sec. 11.

A negotiable instrument is presumed to be made where it is dated.

N. Y. Manufacturers, etc. Co. v. Blitz, 131 App. Div. (N. Y.) 17.

If no place of payment is named in a note, it is presumed to be payable at the place of residence of the maker.

Cox v. Bank, 100 U. S. 704; *Bank v. Lee*, 117 Mich. 122; 75 N. W. 444; *McCrudden v. Jones*, 173 Pa. 507; *Brown v. Jones*, 113 Ind. 46.

See notes on Acceptance and Notice of Dishonor, *post*.

Subd. 4.—This changes the law as laid down in some of the states. Instruments under seal imposing obligations upon private individuals had been held to be non-negotiable.

Merritt v. Cole, 9 Hun. 98.

But it makes no change in the law existing before its adoption in the states of Colorado, Florida, Georgia, Illinois, Kansas, Massachusetts, Nebraska, North Carolina, Ohio and Tennessee.

Prior to the adoption of the statute the courts have been practically unanimous in declaring obligations of corporations having attached thereto a seal, negotiable, on the theory that the seal was not placed there to restrain their negotiability, but rather to stamp them as genuine.

Dinsmore v. Duncan, 57 N. Y. 577; See also, *St. Paul's Church v. Fields*, 81 Conn. 670; *Jackson v. Myers*, 43 Md. 452; *Bank of Houston v. Day*, 145 Mo. App. 410; *Weeks v. Esler*, 143 N. Y. 374; *Chase National Bank v. Faurot*, 149 N. Y. 532; *Osborne v. Hubbard*, 20 Oregon, 318; *Mason v. Frick*, 105 Pa. St. 162.

The mere attaching of a seal after the signature upon a promissory note does not raise the presumption that the note is a sealed instrument unless there be a recognition of the seal in the body of the instrument by some such phrase as "witness my hand and seal" or "signed and sealed."

Matter of Pirie, 198 N. Y. 209.

Subd. 5.—See notes to Sec. 20, Subd. 2; *Dille v. White*, 132 Iowa 327, 10 L. R. A. 510; *Chrysler v. Griswold*, 43 N. Y. 209.

Saving Clause.—Undoubtedly refers to notes given for patent rights or for speculative consideration incorporated in this act. See Sections 330, 331.

§ 26. When payable on demand. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

Subd. 1.—A note payable on demand not affected by conditions contained in a letter.

Beaudrias v. Curtiss, 44 N. Y. St. Rep. 478, 63 Hun. 628.

When a specific sum of money is made payable upon demand, or at a specified time, at a particular place, as against the original debtor, no demand at the time or place, prior to the commencement of the suit is necessary. The commencement of the suit itself is a sufficient demand. The only benefit the defendant could get from the specification of payment at a particular place is that if he was ready there to pay, and kept ready, he could set up that fact in his answer and then pay the money into court and allege such payment in his answer, and thus shield himself from liability for interest and costs.

Howland v. Edmunds, 24 N. Y. 308; *Locklin v. Moore*, 57 N. Y. 360-362; *First National Bank v. Story*, 200 N. Y. 349; *Dominion Trust Co. v. Hildner*, 243 Pa. 253, 90 Atl. 69; *Farmers' National Bank v. Venner*, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690; *Florence Oil, etc., Co. v. First National Bank*, 38 Colo. 119, 88 Pac. 182; *Citizens' Savings Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143; *Dominion Trust Co. v. Hildner*, 243 Pa. 253, 90 Atl. 69; *Deweese v. Middle States, etc., Co.*, 248 Pa. 202, 93 Atl. 958; 1 Daniel, Neg. Inst. Sec. 643; 3 R. C. L. 1174-1175; 7 Cyc. 965.

\$ 200 00	Pittsburg, Pa June 1. 1917
on demand	after date I promise to pay to
the order of Frank W. Curtis	
Two hundred no 100	Dollars
at Dominion Trust Co.	
Value received	
For _____	By A. H. Hildner

The words "on demand" in a note do not make a demand a condition precedent to a right of action, but import that the debt is due and demandable, or at least that the commencement of a suit therefor is a sufficient demand.

Dominion Trust Co. v. Hilder, 243 Pa. St. 235; *Merchants' National Bank v. Lovitt*, 114 Mo. 519.

As between the maker and the payee, a note payable on demand is due as soon as it is executed.

Brophy v. Wilson, 124 Pac. 510.

A promissory note dated July 21, 1874, was by its terms "payable on demand after date with interest after maturity." The note was indorsed and transferred by the payee on the day of its date. It was presented to the bank for payment on the February 4, 1878, which was refused and thereupon protested and the indorser notified. In an action upon the note held, that it was the interest of the parties that the note should be presented for payment, if not immediately, at least within a very short time, and that the delay was such as to dishonor the note, and the indorser was discharged.

Crim v. Starkweather, 88 N. Y. 339.

A note payable on demand and a note payable on demand after date, are for the purpose of the running of the Statute of Limitations deemed due and payable respectively on the day of the date of the note and the day following without demand.

Harden v. Dixon, 77 App. Div. (N. Y.) 241; *McMullen v. Rafferty*, 89 N. Y. 456; *Neg. Int. Law*, Sec. 146.

Such note providing for no payment of interest draws no interest until a demand is duly made.

Ledyard v. Brill, 199 N. Y. 62; *Lawrence v. Church*, 128 N. Y. 324, 332; *Am. & Eng. Ency. of Law* (2nd ed.) 1020; *Adams v. Adams*, 55 N. J. Eq. 42; *Van Vliet v. Kanter*, 139 App. Div. (N. Y.) 605; See Sec. 131.

A negotiable instrument expressed to be payable "on demand after date" is payable on demand, and it is so payable although it is made to bear interest from date.

Fenn. v. Gay, 146 Mass. 118; *O'Neil v. Wagner*, 81 Cal. 631; *Turner v. Iron Mining Co.*, 74 Wis. 355, 43 N. W. 149; *Peninsular Bank v. Hosie*, 112 Mich. 351.

Such demand obligations are, as between the maker and payee, due and payable immediately.

Winsted Bank v. New Hartford, 78 Conn. 319.

Subd. 2.—A note given by an insurance company, payable in such portions and at such times as the board of directors may require is in effect payable upon demand.

Howard v. Edmunds, 24 N. Y. 307.

A note payable at the maker's convenience is payable on demand.

Smithers v. Junker, 41 Fed. Rep. 101.

The legal intentment that a note is payable on demand cannot be changed by parol proof.

Sheldon v. Heaton, 88 Hun. 535; See also, *Roberts v. Snow*, 28 Neb. 425; *Messmore v. Morrison*, 172 Pa. St. 300; *James v. Brown*, 11 Ohio St. 601; *Porter v. Porter*, 51 Maine 376; *Libby v. Mekelborg*, 28 Minn. 38; *Self v. King*, 28 Texas 552.

§ 27. When payable to order. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

Variants.—The Illinois statute adds a new section as follows: “7—An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of the estate.”

Subd. 1.—Where a note is drawn to the maker's own order, it is not complete until it is indorsed by him.

See Sec. 320.

It is not necessary that the payee be designated by name. If his identity can be ascertained with certainty, it is sufficient.

United States v. White, 2 Hill 59; *Blackman v. Lehman*, 63 Ala. 547.

A note by its terms payable to a specified person omitting the words “or order” is in legal effect payable to him or his order and indorsement is effectual to transfer it.

Leavitt v. Putnam, 3 N. Y. 498; *Chetty on Bills* 136.

Subd. 2.—A note payable to the order of the maker does not come into force as a valid note until indorsed by the drawer.

Sauffer v. Curtis, 198 Mass. 560.

Subd. 4.—In a note payable to two persons in the alternative, the interest is deemed joint.

Passut v. Heuvner, 81 Misc. 249; *Willoughby v. Willoughby*, 5 N. H. 244; *Osgood v. Pearsons*, 70 Mass. 455; *Carr v. Bauer*, 61 Ill. App. 504; *Westgate v. Healy*, 4 R. I. 523; *Collyer v. Cook*, 28 Ind. App. 272, 275.

See also Notes Sec. 71.

A note payable to A and B must be sued upon and transferred by them jointly unless in case of partnership.

Ryhner v. Feickert, 92 Ill. 305; Tisdale v. Maxwell, 58 Ala. 40.

Subd. 5.—A note payable to the trustees of a church, or their collector, is not negotiable.

Vorin v. Schoonover, 91 Kans. 530; Noxon v. Smith, 127 Mass. 485.

\$ 268.00	Des Moines, Ia. June 6 1917
Thirty	after date I promise to pay to
the order of Mutual Ins. Co. or Hugh Blackman	
Two hundred sixty eight	Dollars
at Union Bank	
Value received with int	
No. _____	Spies _____

In the foregoing illustration the note was made payable to the Mutual Life Insurance Co. or Hugh Blackman. It is manifest that it does not fall within the terms of this section for the reason that it was not made payable to two or more payees or to their order. It is made payable to either one of two payees and under Sec. 27 its indorsement by either one of the payees named therein would pass title. Under the last named section a note payable to one or some of several payees is payable to the order of any of the payees, and is negotiable.

Union Bank v. Spies, 151 Ia. 178; Bank v. Lightner, 74 Kans. 736.

Were the note payable to the payees jointly, the indorsement of both would be necessary.

Where a promissory note payable "to the order of A or B" is indorsed by A only, to one who takes it in good faith, for value and without any notice of infirmity in the instrument or defect in title, the indorsee is a holder in due course.

Voris v. Schoonover, 91 Kans. 530; Union Bank v. Spies, 130 N. W. (Ia.) 928.

Subd. 6.—A written instrument by which D promises to pay to W, D and M, "Trustees of the Apalachicola Land Company or their successors in office, or order" is a promissory note.

Davis v. Garr, 6 N. Y. 124.

§ 28. **When payable to bearer.** The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

Variant.—In the Illinois statute, subdivision 3 reads:—"When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it." Subdivision 5 of the Illinois statute reads: "When, although originally payable to order it is indorsed in blank by the payee or subsequent indorsee."

Subd. 1.—A note "payable to the order of A or bearer" is payable to bearer and may be transferred without indorsement.

Phoenix Nat. Bank v. Saucier, Miss., 59 So. Rep. 91.

Subd. 2.—A note payable to the maker thereof, as against an accommodation indorser having knowledge of this fact, is to be considered as payable to bearer; and is valid, although negotiated without the indorsement of the payee.

Irving Nat. Bank v. Alley, 79 N. Y. 536.

Subd. 3.—This rule applies only to paper put in circulation by the maker with the knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person. Under the English statute the fact governs. Under the statutes of the various states, the fact coupled *with knowledge* governs.

Shipman v. Bank of New York, 126 N. Y. 318; see also, Irving Nat. Bank v. Alley, 79 N. Y. 536; Phillips v. M. N. Bank, 146 N. Y. 557; Sea-

board Nat. Bank v. Bank of America, 193 N. Y. 34; Boles v. Harding, 201 Mass. 103; Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512; Snyder v. Corn Exchange Bank, 221 Pa. 599; see Section 27.

Where the name of the drawer of a check is forged and the indorsement of the payee also forged, it is apparent that the forger never intended the payee to have an interest in the check, and he is therefore, a fictitious or non-existent person within the meaning of this subdivision, and the check became payable to bearer even though the payee named was an actual person.

Trust Co. of America v. Hamilton Bank, 127 App. Div. (N. Y.) 515.

Where a check is payable to the order of a fictitious or non-existing person, and this fact was known to the person who signed the check, the check is deemed to be payable to bearer. Although such a check apparently requires an indorsement in order to transfer it, it is in reality transferable without indorsement just as though it were actually made payable to bearer. Consequently, if a check of this kind is indorsed with the payee's name, the indorsement is immaterial and cannot be regarded as a forgery, and, if the drawee bank pays the check, it is not responsible to its depositor for the amount as it would be in the ordinary case of paying a check bearing a forged indorsement.

Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. Rep. 982, 23 L. R. A. 584.

A check may be regarded as payable to a fictitious person, and therefore payable to bearer, though it names as payee an actually existing person. This happens when the person drawing the check to the order of an existing person does so for his own purposes and intends that the payee shall have no interest whatever in the check. The check is in effect payable to a nonentity.

Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 23 L. R. A. 584; Snyder v. Corn Exchange Bank, 221 Pa. 599; see also, Shipman v. Bank, 126 N. Y. 318; Jordon Co. v. Nat. Shawmut Bank, 201 Mass. 397; Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512; Guaranty State Bank v. Lively (Tex.) 149 S. W. 211.

Subd. 4.—This rule is intended to cover cases where checks are payable to "cash," "payroll" or to "sundries."

Willets v. Phoenix Bank, 2 Duer 121; Mechanics Bank v. Stratton, 2 Keyes 365.

Subd. 5.—An indorsement in blank on a non-negotiable note does not make it negotiable.

Wettlaufer v. Baxter, 137 Ky. 362; Johnson v. Lassiter, 155 N. C. 47.

§ 29. Terms, when sufficient. The instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Variant.—The statutes of Alabama, Idaho, Iowa, North Carolina and Wyoming have inserted the word “negotiable” between the first two words. This change appears to be superfluous, Sec. 2 having defined instruments as used in this act to mean “negotiable instrument.” The Wisconsin statute adds to the end of the section: “Memoranda upon the face or back of the instrument, whether signed or not, material to the contract, if made at the time of delivery, are part of the instrument, and parol evidence is admissible to show the circumstances under which they were made.”

A negotiable instrument is not affected by reason that it is written in a foreign language.

Delebian v. Gala, 64 Md. 262, or whether written with pencil or ink. *Brown v. Butchers' Bank*, 6 Hill 443.

A written statement that a certain amount of money is due a payee therein named, followed by the signature of the maker of the statement, implies that the money is due from the maker and is an indebtedness from him to the person to whom the money is thus acknowledged to be due. The acknowledgement of the indebtedness and that it is due implies a promise to pay it on demand. It is a promissory note within the statute.

Hageman v. Moon, 131 N. Y. 462; *Gilbert v. Adams*, 146 App. Div. 864.

A negotiable bill or note is courier without luggage. It is a requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract, and though this requisite be a minor one, it is entitled to weight in determining a question of intention.

Overton v. Tyler, 3 Pa. St. 346; 45 Am. Dec. 645; *Woodbury v. Roberts*, 59 Ia. 348.

§ 30. Date, presumption as to. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement as the case may be.

A check has no inception until delivery and the date is *prima facie* evidence of the time it was made. A party accepting a check considerable time after its date is put upon inquiry, and in the absence of explanation, takes it subject to any defense existing as between the payee and drawer.

Cowing v. Altman, 71 N. Y. 435.

If there is no such date the law will deem the nearest date of that month the date intended. A note dated September 31st will be construed as to have been intended for September 30th.

Wagner v. Kenner, 2 Rob. (La.) 120. See notes, Sec. 25, Subd. 1.

§ 31. Ante-dated and post-dated. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Variant.—The Missouri statute reads “valid” instead of “invalid,” evidently an error.

A check is not invalid for the reason only that it is antedated or post-dated, providing this is not done for an illegal or fraudulent purpose, and an indorsee is not put upon inquiry merely because of the negotiation of the check prior to the day of its date.

Albert v. Hoffman, 64 Misc. 87.

A postdated check may be negotiated before the day of its date.

Brewster v. McCardle, 8 Wend. 475; Passmore v. North, 13 East 517; Albert v. Hoffman, 64 Misc. 88.

Where a bank under such circumstances pays the check it is liable to a depositor if there are not left sufficient funds to pay a subsequent check dated prior to the postdated check.

Smith v. Maddox, etc. Banking Co., 135 Ga. 151.

The intent of the section is to cover instruments so dated by mutual understanding between the parties.

Bank of Houston v. Day, 145 Mo. App. 410.

But if such false date is inserted to evade the law it is void as to all persons having notice.

Serle v. Norton, 9 M. & W. 309.

§ 32. When date may be inserted. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of

a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

A note made June 10th and dated June , the day of the month left blank, was indorsed for accommodation and thereafter transferred by the maker for value. The holder without the knowledge of the other parties thereto filled the blank date with the figure "1". Held, there was an implied authorization to fill the blank date, and the indorsers, who delivered the note in blank, were bound by the date filled in.

Page v. Morrell, 3 Abbt. Ct. App. Dec. 433; Mitchell v. Culver, 7 Cowen, 336; Bank of Houston v. Day, 145 Mo. App. 410; See Notes, Sec. 33.

Where a note is, before delivery, made complete in accordance with its general character, and is free from words and unscored blanks reasonably indicating incompleteness, the unauthorized addition of words or figures by filling of unoccupied blanks or parts of blanks, or otherwise, is such an alteration, if material, as will make the paper void in the hands of the forger or any one claiming under him.

Kindler v. First Nat. Bank, 109 N. E. (Ind.) 68.

§ 33. Blanks; when may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Variant.—The Illinois statute adds the words "issued or" before negotiable in the last sentence. The South Dakota statute reads as follows:—One who makes himself a party to an instrument, intended to be

negotiated but which is left wholly or partly in blank for the purpose of filling in afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled so long as it remains negotiable in form. The Wisconsin statute adds "prior to negotiation" before the words "by filling" and omits the words "prima facie" in the second sentence.

When considering this section it is important to bear in mind the distinction which exists between (1) those notes in which obvious blanks are left at the time when they are made or indorsed, of such a character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up, and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures, or both.

One who signs or indorses a note of the first class is liable to bona fide holders thereof, on the doctrine of implied authority, while in other cases relating to notes of the second class, the liability of the maker or indorser for the amount of the note has increased by filling up unoccupied spaces therein is placed upon the doctrine of negligence.

Cannon v. Grigsley, 116 Ill. 151; National Exchange Bank v. Lester 194 N. Y. 464; Winter v. Poole, 104 Ala. 580; Stanton v. Stone, 61 Pac. 481; Carson v. Grant Bank, 96 Ky. 487; Weidman v. Symes, 120 Mich. 657; Lowden v. Nat. Bank, 38 Kansas 533.

As to the liability of a party who has endorsed or become surety upon a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions in enlarging the amount, see

Garrard v. Haddan, 67 Pa. St. 82; Yocum v. Smith, 63 Ill. 321; Scotland v. O'Connel, 23 Mo. App. 165; Hackett v. Bank of Louisville, 114 Ky. 193; Burrows v. Klunk, 70 Md. 451. See Section 205 and notes.

An uncompleted, negotiable instrument sent by a maker residing in Massachusetts to an agent in Canada to be filled out and delivered to the payee there is subject to Canadian laws governing the completion of negotiable instruments.

Perry v. Pye, 215 Mass. 403.

In Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427, the defendant voluntarily signed a blank out of which a promissory note was made when he supposed the blank was to be filled out for another purpose. In that case the court said:

"The note, then, owed its existence to some instrumentality on his part. The perfected note was the result of his putting his name to the blank; a result which might have been contemplated as the natural and

even probable effect of such an act. The signature contributed to that end very materially, and that end was reached by the confidence, misplaced though it was, which he had in the payee. If, then, this act resulted from negligence, or a want of due care on the part of the defendant, however innocent he might be, he would be responsible to any person equally innocent with himself who is injured by that act. This results not only when the person committing the fraud is the appointed agent of the defendant, but where no such relation exists."

Amount.—One who intrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank is filled by a sum exceeding that agreed upon.

Van Duzer v. Howe, 21 N. Y. 531; *Trust Co. of America v. Conklin*, 65 Misc. 1.

A promissory note with the time and place of payment in blank and given by the indorser to the maker, who in addition to filling the blanks inserted the words "with interest." Held, that the delivery of the note gave the holder implied authority to fill the blanks by inserting any time and place he chose, but it did not authorize the addition of the words "with interest," and that such addition was a material alteration which invalidated the note in the absence of proof of some authority therefor, aside from the delivery.

McGrath v. Clark, 56 N. Y. 38; *Meyer v. Huenke*, 55 N. Y. 412; *Dumbrow v. Geib*, 72 Misc. 400; *Columbia Distilling Co. v. Rech*, 151 App. Div. 128; *Exchange Bank v. Little*, 164 S. W. 731.

The courts distinguish between notes in which obvious blanks are left and notes which are apparently complete, but in which there is space to insert additional writing.

National Exchange Bank v. Lester, 194 N. Y. 465; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; *Garrard v. Hadden*, 67 Pa. St. 82; *Hartington v. Breslin*, 88 Neb. 47; *Weyerhauser v. Dunn*, 100 N. Y. 50.

Where the amount is stated in figures on the space on the margin and a blank space is left for the amount in the body of the instrument, it is not complete until such amount is written.

Chestnut v. Chestnut, 104 Va. 539; *Hepler v. Mt. Carmel Bank*, 97 Pa. St. 420.

But the holder is not authorized to write in a larger amount than called for by the figures.

Norwich Bank v. Hyde, 13 Conn. 284; *Prim v. Hamil*, 32 S. Rep. (Ala.) 652; *Toomer v. Rutland*, 29 A. Rep. (Ala.) 722; *Nat. Bank v. Carson*, 60 Mich. 432.

Where a check with the amount in blank was given by a woman to her husband instructing him to deliver it to a creditor in payment of her

account, and it was delivered by the husband to be used in the payment of his own debt, and allowed the creditor to insert such amount. Held, that the instrument was incomplete, and in an action by the creditor against the woman for payment of her indebtedness she could introduce evidence to show that by the authority given by her to her husband, he had no right to apply it other than for her debt.

Boston Steel & Iron Co. v. Steuer, 183 Mass. 140; *Kramer v. Schnitzer*, 109 N. E. Rep. 695.

The payee of a check which was originally delivered with the amount left blank, is not under the burden of showing authority to fill in the blank.

Madden v. Gaston, 137 App. Div. (N. Y.) 294; *Davison v. Lanier*, 4 Wall 447; *Business Men's League v. Sragow*, 153 N. Y. Supp. 231.

The rule that the *bona fide* holder of an incomplete instrument, negotiable but for some lack capable of being supplied, has implied authority to supply the omission, and to hold the maker thereon, only applies where the latter has by his own act, or the act of another, authorized, confided in or invested with apparent authority by him, put the instrument in circulation as negotiable paper, and does not apply where the paper has been stolen.

Linick v. Nutting, 140 App. Div. (N. Y.) 265; *Solley v. Terrill*, 95 Me. 553, 55 L. R. A. 730; *Citizens Bank v. Moreland*, 71 S. W. (Ky.) 102; *Nichols v. Frothingham*, 45 Me. 220; *Market Nat. Bank v. Sargent*, 85 Me. 349; *Smith v. Willing*, 123 Wis. 377.

Sometimes an alteration in a note, seemingly material, and such as may *prima facie* render it void, is innocent and does not vitiate the instrument. So it is, when it is done to correct a mistake in penning the note, or to make it express the real bargain of the parties, or to give the proper legal form to their contract. In such a case the payee has the right to enforce it.

Booth v. Powers, 56 N. Y. 22-31; *Levy v. Arons*, 81 Misc. 166.

But where in a check "or order" is changed to "bearer," see *Builders Lime & Cement Co. v. Welmer*, 151 N. W. (Ia.) 100.

If one signs a negotiable note in blank amount, the payee has authority *prima facie*, to complete it, in a reasonable time, by filling in the amount authorized, and if he fills it in any other sum he cannot hold the maker (or anyone else who became a party to it before it was completed) unless, after its completion, it is negotiated to a holder in due course, in which case, the maker (or those becoming parties to it before its completion) can be held regardless of whether the amount was authorized.

Exchange Bank v. Robinson, 185 Mo. App. 585.

Place.—In *Redlich v. Doll*, 54 N. Y. 235 held, that a note perfect in form except the filling of the blank intended for place of payment carried upon its face an implied authority for any bona fide holder to insert the place of payment. Even if the blank be filled contrary to agreement or intention of the original parties, the maker is held to any bona fide holder for value, upon the principle that, where one or two innocent parties must suffer by the fraud or wrong of a third person, the one who put in the power of such third person to commit the fraud or wrong must bear the loss.

Diamond Distilleries Co. v. Gott, (Ky.) 126 S. W. 131; *Van Duzer v. Howe*, 21 N. Y. 531; *Winter v. Poole*, 104 Ala 580.

"Business men, who place their signatures to blanks, suitable for negotiable bills of exchange or promissory notes, and entrust them to their correspondents to raise their money at their discretion ought to understand the operation and effect of this rule, and not to expect that courts of justice will fail in such cases to give it due application."

Bank of Pittsburgh v. Neal, 63 U. S. 96; *Redlich v. Doll*, 54 N. Y. 234.

Parties.—This section does not authorize a person to alter a note payable to several payees jointly to make it payable to himself.

Nat. Bank v. Gridley, 112 App. Div. (N. Y.) 398.

But he may insert his own name in a blank space left for the name of the payee.

Boyde v. McCann, 10 Md. 118.

Signature.—While it has been held that the delivery of a promissory note with blanks unfilled implies authority to complete it, yet it can hardly be claimed that one drawing a promissory note which is unsigned, and falls into the hands of another, thereby authorizes the holder to attach the maker's signature or add anything which is incomplete in its execution.

Davis Sewing Machine Co. v. Best, 105 N. Y. 67.

In *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427, the defendant voluntarily signed a blank out of which a promissory note was made when he supposed the blank was to be filled out for another purpose. In that case the court said:

"The note, then, owed its existence to some instrumentality on his part. The perfected note was the result of his putting his name to the blank; a result which might have been contemplated as the natural and even probable effect of such an act. The signature contributed to that end very materially, and that end was reached by the confidence, misplaced though it was, which he had in the payee. If, then, this act resulted from negligence, or a want of due care on the part of the defendant, however innocent he might be, he would be responsible to any person equally

innocent with himself who is injured by that act. This results not only when the person committing the fraud is the appointed agent of the defendant, but where no such relation exists."

In the same case the court cited with approval the case of *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263, in which that court declared:

"If, however, a bill, note, or check is so negligently drawn, with blank spaces left for the addition of other words or figures, that alterations can be made so as not to excite suspicion, the loss ought to fall on the person in fault, according to the familiar rule that, when one of two persons must suffer by act of a third, the one who affords the means to the wrongdoer must sustain the loss."

The authority implied by a signature to a blank note, and the credit given, are so extensive that the party so signing will be bound to a holder for value in due course, although such note was only authorized to be used for a purpose different from that to which it has been perverted.

Rusmisse v. White Oak Stove Co., 92 S. E. 672.

Date.—One who signs or indorses a note in blank, authorizes the person to whom it is delivered to fill the blanks in respect essential to the completeness of the note as such; but in the absence of express authority or consent, no authority can be implied from delivery to insert a special agreement not so essential.

Weyerhauser v. Dunn, 100 N. Y. 151; see notes to Section 32.

The absence of a date upon a negotiable instrument at its inception, or the fact that it is post or antedated, may not be material upon the question of its validity; but when a date has once been inserted and its time of payment has been fixed, such date is material and cannot be altered without the consent of the maker.

Dan. Neg. Inst. 1376-7, 1577-8; *Bank of Houston v. Day*, 145 Mo. App. 410; *Eastman v. Shaw*, 65 N. Y. 522; *Miller v. Gilleland*, 9 Penn. St. 119; *Crawford v. West Side Bank*, 100 N. Y. 51; see Section 206.

Where an undated note in which blanks were left for the name of the payee and time of payment, after indorsement and with the assent of the indorser, was delivered to plaintiff for value, with authority to fill in the blanks at any time she needed the money, she, under this section, had the right to complete the note by filling in the blanks; and the indorser is liable for the amount of the note.

Usef v. Herzenstein, 65 Misc. 45; *Nat. Exchange Bank v. Lester*, 194 N. Y. 471; *Johns v. Havinson*, 20 Ind. 317.

Reasonable time.—The burden is on the payee to show they were filled in within a reasonable time. A delay of eight months, unexplained, is not within reasonable time.

Madden v. Gaston, 137 App. Div. 296; Union Trust Co. v. McAneny, 145 App. Div. 412.

Incomplete instruments generally.—If a bill, note or check is so negligently drawn with blank space left for the addition of other words, that they can be filled in without suspicion, the loss ought to fall on the person in fault, according to the familiar rule, that when one or two persons must suffer by the act of a third, the one who affords the means must sustain the loss.

Trigg v. Taylor, 27 Mo. 245, 72 Am. Dec. 263; Kellogg v. Curtis, 65 Me. 59; Yocum v. Smith, 63 Ill. 321; Knoxville Nat'l Bank v. Clark, 51 Iowa 264; Mannussier v. Wright, 158 Ill. App. 219; Hackett v. First Nat'l Bank, 114 Ky. 193; Burrows v. Klunk, 70 Md. 451; Holmes v. Trumper, 22 Mich. 427; Stone v. Sargent, 220 Mass. 445; Harrington Nat'l. Bank v. Breslin, 88 Neb. 47; Redlich v. Doll, 54 N. Y. 238; Town of Solon v. Williamsburg Bank, 114 N. Y. 122; Critten v. Chemical Nat'l Bank, 171 N. Y. 219; Angle v. N. W. Mut. Life Ins. Co., 92 U. S. 330; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Johnson v. Hoover, 117 N. W. (Ia.) 277.

§ 34. Incomplete instrument not delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Variant.—The Wisconsin statute substitutes the word "negotiation" for "delivery" and the end of the sentence.

A negotiable instrument must be a complete and perfect instrument when it is issued, or there must be authority reposed in some one afterward to supply anything needed to make it perfect.

Lednich v. McKim, 53 N. Y. 313; Davis Sewing Machine Co. v. Best, 105 N. Y. 67; Norwich Bank v. Hyde, 13 Conn. 279; Dan. Neg. Int., Sections 841, 842.

While the possession of a negotiable instrument is *prima facie* evidence of delivery, yet if it is shown that it was never actually delivered, no recovery can be had upon it in the hands of an innocent holder for value.

Linick v. Nutting, 140 App. Div. (N. Y.) 265; Burson v. Huntington, 21 Mich. 415;

Where a verbal agreement is made that a promissory note delivered by the maker to the payee shall not be effective until others have signed, it will have no validity between the parties unless the conditions are complied with.

Hodge v. Smith, 130 Wis. 326; see notes, Sections 33, 35, 94.

§ 35. **Delivery; when effectual; when presumed.** Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Variant.—The Kansas statute strikes out the third sentence. The North Carolina statute omits “accepting” in the second sentence. The South Dakota statute substitutes for the third sentence commencing with the word “But” as follows: “An indorsee of a negotiable instrument in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it.”

Delivery being the final act in the execution of a negotiable instrument is as essential as the signature of the maker.

Purvance v. Jones, 21 N. E. (Ind.) 1099.

There is no doubt that, by virtue of the rule embodied in this section, the rule of law governing ordinary contracts or instruments, that a contract becomes effectual only by actual delivery, is modified, at least to the extent that, where a negotiable instrument is in the hands of a “holder in due course” a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed.

Notes properly signed, sealed and placed in an envelope properly addressed to the payee, and delivered to the United States mail at a certain place with postage prepaid, are deemed delivered at such time and place.

Garrigue v. Kellar, 108 Ind. 324.

Necessary to Deliver.—A check or note has no inception until delivery, and for all legal purposes it is to be considered as made on the date of its delivery.

Cowing v. Altman, 71 N. Y. 441; *Burr v. Beekler*, 264 Ill. 230.

As between the original parties, delivery involves not only a change of possession, but also an intent that the note shall become effective.

Bombolaski v. Bank, 103 N. E. (Ind.) 422.

When delivered to the payee the promise became effective, and it is then, and not before, become a chose in action, valid and effective.

Wilcox v. Corwin, 117 N. Y. 503; *Eastman v. Shaw*, 65 N. Y. 528; *Burton v. Huntington*, 21 Mich. 416; *Griffith v. Kellogg*, 39 Wis. 290; *Grannis v. Stevens*, 216 N. Y. 583.

Actual or constructive delivery of an indorsed promissory note payable to order is essential to vest title; but delivery must be presumed *prima facie*, from possession of a properly indorsed note, which presumption will prevail, in the absence of rebutting evidence.

Chandler v. Hedrick, 187 Mo. App. 665; *Newcomb v. Fox*, 1 App. Div. (N. Y.) 389; *Madden v. Gaston*, 137 App. Div. (N. Y.) 294.

Where the maker of a promissory note allows the same to get into circulation, he is liable to a bona fide holder upon the ground that he is estopped by his own negligence to deny a valid delivery. The maxim declaring that where one of two innocent persons must suffer by the reason of the wrong of a third party, he whose acts made the wrong possible should bear the loss, will apply.

See Section 91; *Palmer v. Poor*, 121 Ind. 135; *Dodd v. Dunn*, 71 Wis. 578.

The delivery of a check by the maker to his agent is not delivery to the payee.

Mutual Life Ins. Co. v. Barry, 211 Mass. 306.

A delivery of a note to an agent of the payee, is a sufficient delivery.

Quality Co. v. Corkill, 182 Ill. App. 175.

Stolen or lost before delivery.—The courts are not unanimous on the question of liability of the maker of negotiable paper lost or stolen before delivery. See,

Kinyon v. Wohlford, 10 Am. St. Rep. (Minn.) 165; *Magee v. Badger*, 34 N. Y. 247; *Shippley v. Carroll*, 45 Ill. 285; *Cook v. United States*, 91 U. S. 389; *Rockwell Bank v. Citizens Co.*, 45 Atl. (Conn.) 361; *Cline v. Guthrie*, 42 Ind. 227; *Caulkins v. Whistler*, 29 Ia. 495; *Burson v. Huntington*, 4 Am. Rep. (Mich.) 497; *Palmer v. Poor*, 22 N. E. (Ind.) 984, 6 L. R. A. 469; *Salley v. Terrill*, 50 Atl. (Me.) 896; *Davis Machine Co. v. Best*, 105 N. Y. 59; *Branch v. Commissioners*, 80 Va. 427; *Dodd v. Dunn*, 37

N. W. (Wis.) 430; *Walters v. Tielkmeyer*, 72 Mo. App. 371; *Wheeler v. Guild*, 37 Mass. 545; *Poess v. 12th Ward Bank*, 86 N. Y. Supp. 857; *Pollard v. Vinton*, 105 U. S. 7.

In *Burson v. Hunting*, 21 Mich. 415, where a note was taken by a payee from a table in the room of the maker, without his authority or consent, and transferred to an innocent holder for value, on the question of the maker's liability the court said: "The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There are undoubtedly cases where the negligence of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up non-delivery, as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public."

See also *Linick v. Nutting Co.*, 140 App. Div. (N. Y.) 265; Note Section 96.

But in *Schaeffer v. Marsh*, 90 Misc. 307, in a review of the foregoing cases held, that if the instrument is complete, except as to delivery, the non-delivery is not a defense as against a bona fide holder in due course for value.

A want of delivery cannot be urged as a defense against a bona fide holder of a negotiable note where it appears that the note got into circulation through the fault or negligence of the defendant.

Clark v. Johnson, 54 Ill. 296; *Bombolaski v. Nat. Bank*, 55 Ind. App. 182; *Palmer v. Poor*, 121 Ind. 135.

A holder in due course of commercial paper may recover thereon, although the instrument was originally stolen from the maker, for the reason that where one or two innocent persons must suffer by the wrong of another, he whose act made the loss possible must suffer.

Angus v. Downs, 85 Wash. 75.

A note ordinarily has no legal existence until delivered pursuant to the intentions of the parties.

Stockton v. Turner, 153 N. W. 641.

Conditional Delivery.—A promissory note may be delivered upon a condition, the observance of which is essential to its validity as between the parties to the paper, and where the answer contains an explicit denial of

delivery of the note as alleged in the complaint, and avers a delivery to a different person upon a condition which has not been fulfilled, it raises a question of fact for the jury.

Niblock v. Sprague, 200 N. Y. 390; *Bookstaver v. Jayne*, 60 N. Y. 146.

Where the maker of a promissory note in a suit against him by the payee pleads that the delivery was conditional and the non-fulfillment of the condition, such conditional delivery may be proved by parol proof, and the parol proof is not deemed an attempt to vary or contradict the written contract between the parties.

Higgins v. Ridgway, 153 N. Y. 130; see also *Sayre v. Leonard*, 57 Colo. 116; *McFarland v. Sikes*, 54 Conn. 250; *Benton v. Martin*, 52 N. Y. 570; *Chapin v. Dobson*, 78 N. Y. 74; *Reynolds v. Robinson*, 110 N. Y. 654; *Burke v. Dulaney*, 153 U. S. 228; *Hodge v. Smith*, 130 Wis. 326; *Cavanagh v. Beer Co.*, 113 N. W. (Ia.) 856; *Hilsdale v. Thomas*, 40 Wis. 661; *Juilliard v. Chafee*, 92 N. Y. 529; *Revere Bank v. Morse*, 163 Mass. 383; *Vosburg v. Diefendorf*, 119 N. Y. 357; *Citizens Bank v. Millet*, 103 Ky. 1.

This section does not require that the contract of conditional delivery shall be in writing.

Norman v. McCarthy, 56 Colo. 290.

A note founded upon a good consideration, which remains in the hands of the payee until the death of the maker, is valid, although it was received and held by the payee on condition that it should be returned whenever the maker might request.

Warth v. Case, 42 N. Y. 362.

Where the maker of a note delivers it to the payee with the understanding that it shall be inoperative until the happening of a certain event or the performance of a certain condition, which event or condition has not occurred or been performed, an action cannot be maintained thereon.

McKnight v. Parsons, 113 N. W. (Ia.) 858; *Central Bank v. O'Connor*, 94 N. W. (Mich.) 11; *Larson v. Seguin*, 149 N. W. 174.

It is necessary, in order to render a delivery conditional, that express words to that effect be used at the time. The conclusion may be drawn from all the circumstances which properly form a part of the entire transaction, whether in point of time they precede or accompany the delivery.

Wilson v. Powers, 131 Mass. 539.

A note delivered on condition that it shall be ineffective unless signed by another as co-maker cannot be enforced by the payee unless so signed.

State Bank v. Kelly, 152 N. W. 125.

Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible. A promissory note, like any other written instrument, has no legal inception or valid existence until it has been delivered in accordance

with the purpose and intention of the parties, and in support of a plea denying its execution it is competent to show, as between the parties to it or others having notice, that the manual delivery of the instrument to the payee was accompanied by a condition which was never fulfilled.

Hunter v. Bank, 172 Ind. 62; Bank v. O'Connor, 132 Mich. 578; Burke v. Dulaney, 153 U. S. 228; Bank v. Borman, 124 Ill. 200.

It is competent for the defendant to show that the note never had a valid inception and that the delivery was conditional.

Smith v. Dotterwich, 200 N. Y. 299; 33 L. R. A. 892; Rubel v. Honig, 164 N. Y. Supp. 219.

As between the original parties to a promissory note and others having notice, a conditional delivery may be shown, and parol evidence that the delivery was conditional and of the terms of the condition is not open to the objection of varying or contradicting the written instrument.

Higgins v. Ridgway, 153 N. Y. 130; Bookstaver v. Jayne, 60 N. Y. 146; Persons v. Hawkins, 41 App. Div. (N. Y.) 171; Simmons v. Thompson, 29 App. Div. (N. Y.) 559.

Testimony as to oral conversations contemporaneous with the making and delivery of a note representing a loan, that the money would not be demanded back until a certain event happened, was admissible only if tending to prove that the delivery of the note itself was made upon condition that it should not be complete until the event; i. e., it was introduced, not to vary or to show that there was no agreement until the event happened.

Weinhandler v. Loewenthal, 159 Supp. 695.

The manual transfer of an instrument, in form a complete contract, does not bar parol evidence that it is not to become binding until the happening of some condition precedent resting in parol, or that the transfer is for a special purpose.

Reynolds v. Robinson, 110 N. Y. 654; Higgins v. Ridgway, 153 N. Y. 130; Burke v. Dulaney, 153 U. S. 228; Niblock v. Sprague, 200 N. Y. 390.

It is a question of fact whether any written agreement, though in possession of the obligee, has been delivered by the obligor as a binding agreement, or whether any delivery that has been made is conditional only.

Elastic Tip Co. v. Graham, 185 Mass. 597; Benton v. Martin, 52 N. Y. 570; Eastman v. Shaw, 65 N. Y. 522; Bookstaver v. Jayne, 60 N. Y. 146; Grierson v. Mason, 60 N. Y. 394; Megowan v. Peterson, 173 N. Y. 1; Juilliard v. Chaffee, 92 N. Y. 529.

Act and intention are the essential constituents of a delivery which makes the instrument operative according to its terms. The final question is, did the obligor do such act in reference to it as evidences an intention to give it, in the possession or control of the obligee, effect and operation

according to its terms. Whenever there has been a delivery of the instrument for the purpose of giving it such effect, it becomes a present and completed contract, and parol evidence cannot be given to contradict, vary or modify its terms.

Jamestown Business College Assn. v. Allen 172 N. Y. 291; *Wooley v. Cobb*, 165 Mass. 503; *Currier v. Hale*, 8 Allen 47; *Tower v. Richardson*, 6 Allen 351; *Brown v. Wiley*, 20 How. (U. S.) 442; *Thomas v. Scutt*, 127 N. Y. 133.

Bills and notes may be delivered to take effect, not at all events, but conditionally upon the happening of a future contingency, and this may be accomplished, either by a formal delivery in escrow into the hands of a third person for the promise, or by delivery to the promisee himself in the nature of an escrow; the intervention of a third person not being absolutely necessary.

Gamble v. Riley, 39 Okla. 368; *Horton v. Birdsong*, 129 Pac. 701; *Lyons v. Stills*, 37 S. W. (Tenn.) 280; 4 Am. and Eng. Ency. Law, 204; *McNight v. Parsons*, 113 N. W. (Ia.) 858.

Delivery by mistake. Where a note was given by mistake as to the party receiving it, and was accepted by such party fraudulently, with knowledge of the maker's mistake, the note is void from its inception.

Bergmann v. Salmon, 79 Hun. 456, affirmed in 150 N. Y. 575.

Testimony as to oral conversations, contemporaneous with the making and delivery of a note representing a loan, that the money would not be demanded back until a certain event happened, was admissible only if tending to prove that the delivery of the note itself was made upon condition that it should not be complete until the event; i. e., if it was introduced, not to vary or explain defendant's agreement, but to show that there was no agreement until the event happened.

Weinhandler v. Loewenthal, 159 N. Y. Supp. 695; *Smith v. Dotterweich*, 200 N. Y. 299, 33 L. R. A. 892.

In an action by the payee upon a promissory note, the maker was properly permitted to show a contemporaneous oral agreement pursuant to which the note was delivered conditionally and for a special purpose only, and was not to be paid unless the amount thereof was collected by the maker in a certain suit to foreclose a mechanic's lien. Such evidence did not vary or contradict the written contract.

Harder v. Reinhardt, 162 Wis. 558; *Hodge v. Smith*, 110 N. W. 192; *Paulson v. Boyd*, 118 N. W. 841.

The words "immediate parties" refer to those who are "immediate" in the sense of knowing or being held to know of the conditions or limita-

tions placed upon the delivery of the instrument. A payee who is a holder in due course is not an immediate party in the sense of this section.

National Security Co. v. Corey, 222 Mass. 455.

Holder in due course. See Sec. 91; *Linick v. Nutting Co.*, 140 App. Div. N. Y. 268.

Delivered checks revoked upon drawer's death. A check is revoked by the drawer's death.

Simmons v. Society, 31 Ohio St. 457; *Tate v. Hilbert*, 2 Vesey, Jr., (Eng.) 111; *Second National Bank v. Williams*, 13 Mich. 282.

A bank is protected in paying a check in ignorance of the drawer's death.

Drum v. Benton, 13 App. Cases (D. C.) 245; *Weiand's Admr. v. State Nat. Bank*, 112 Ky. 310, 65 S. W. Rep. 617; *Brennan v. Merchants' & Mfrs. Nat. Bank*, 62 Mich. 343, 28 N. W. Rep. 881.

The death of the drawer of a check before its payment or certification revokes the bank's authority to pay it, but the bank is protected in paying the check in ignorance of the drawer's death.

In re *Stacey's Estate*, 152 N. Y. Supp. 717; *Brennan v. Merchants' & Manufacturers' Nat. Bank*, 62 Mich. 343, 28 N. W. Rep. 881.

A bank which pays a check with knowledge of the drawer's death is liable for the amount to his estate.

Pullen v. Placer County Bank, 138 Cal. 169, 71 Pac. Rep. 83.

Where a check delivered to the payee without consideration is collected by the payee after the drawer's death, the money so received remains the property of the estate of the drawer.

In re *Stacy's Estate*, 152 N. Y. Supp. 717.

Where the payee of a check collects it after the death of the drawer, he must refund the amount to the drawer's estate.

In re *Adamson's Will*, 154, N. Y. Supp. 667.

Massachusetts Rule.—There is a statute in Massachusetts relating to savings banks and institutions for savings (Chapter 590, Acts of 1908), Section 65 of which provides:

"Such corporation may pay an order, drawn by a person who has funds on deposit to meet the same, notwithstanding the death of the drawer, if presentation is made within thirty days after the date of such order; and at any time if the corporation has not received written notice of the death of the drawer."

The above, however, would not apply to a national bank so as to authorize payment of a customer's check after his death where the officials had knowledge thereof.

There seems to be some diversity of authority in the various states as to whether the payee of a negotiable instrument can ever be a "holder in due course" within the meaning of the statute. See *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B, 144, which hold that a payee is not necessarily a remote party, and may be a holder in due course. See, also, *Vander Ploeg v. Van Zuuk*, 135 Iowa 350, 112 N. W. 807, 13 L. R. A. (N.S.) 490, 124 Am. St. Rep. 275; *Long v. Shafer*, 185 Mo. App. 641, 171 S. W. 690, which hold that a payee is an immediate party, and cannot be a holder in due course, and does not take free from any defenses which the maker could interpose if the instrument were non-negotiable.

§ 36. Construction where instrument is ambiguous.

Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount:

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Variant.—The North Carolina statute omits subdivision 2. The Wisconsin statute adds a new subdivision as follows:—"8. When several writings are executed at or about the same time, as parts of the same transaction, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

Subd. 1.—The figures in the margin of an instrument are no material part of it and are used as convenience.

Norwich Bank v. Hude, 13 Conn. 281; Schreyer v. Hawkes, 22 Ohio St. 308; Prim v. Hammel, 134 Ala. 652; Kimball v. Costa, 76 Vt. 289; Witty v. Michigan Mut. Life Ins. Co., 123 Ind. 411.

The theory of inserting the figures in addition to the written amount in the body of the instrument is that the amount might strike the eye immediately.


Gerard v. Lewis, L. R. 10 Q. B. Div. 30.

Marginal figures in a note may be referred to for the purpose of supplying the amount for which the note was given, when such amount has been wholly omitted in the body of the note.

Kimball v. Costa, 76 Vt. 289.

21-51

LOUISVILLE, KY., Sept 1, 1917



PAY TO St. Paul's Church OR ORDER \$ 70

Twenty DOLLARS

John M. Jones

(INDORSED)

PAY TO W. S. GOODWIN
JOHN BROWN, WARDEN
W. S. GOODWIN

From the face of the check it is not plain whether the amount intended is \$20.00 or \$70.00. Providing the indorsements were correct the paying teller would be justified in paying the lesser amount. As to the indorsement,

"John Brown, Warden," it is incorrect, as such indorsement is not the indorsement of St. Paul's Church, and would be a personal indorsement of John Brown—the word "Warden" being merely descriptive. If, however, John Brown was authorized to indorse the paper of St. Paul's Church, and was in the custom of indorsing as above, such authority should be in the hands of the paying bank before the amount be paid. The indorsement of W. S. Goodwin being in blank would make the check payable to bearer in case the previous indorsement had been correct.

LOUISVILLE, Ky. July 5, 1917

UNITED STATES TRUST COMPANY 21-25

PAY TO THE
ORDER OF Mrs. A. S. Dunn \$ 270⁰⁰

Two Hundred Seventy ⁰⁰/₁₀₀ DOLLARS

C. N. Meyer

(INDORSED)

PAY TO UNION TRUST CO.,
ANNA B. DUNN
UNION TRUST CO.

The amount of the check as evidenced by the writing and figures is misleading. The check should be paid for the amount in writing, for which amount the maker is liable—the figures being a mere memorandum. Regarding the indorsement, "Anna B. Dunn," if she is known to be the same person as Mrs. A. S. Dunn mentioned as payee, the indorsement should be accepted. If, however, the paying bank has no such knowledge, the check should be returned to the Union Trust Company for the irregularity. However, the paying bank may rely upon the right of recourse against the Union Trust Company, the last indorser. It is a custom, however, to enable previous indorsers to protect themselves to draw attention to such irregularities.

Subd. 2.—Where a note provided for the payment of interest and no rate being mentioned it will draw interest at the legal rate of the place where dated.

Franklin Bank v. Roberts, 168 N. C. 473; Homstein v. Cifunio, 86 Neb. 103.

Interest Laws of All the States.

STATES AND TERRITORIES.	DAYS OF GRACE		RATES OF INTEREST.		STATUTES OF LIMITATIONS.		
	Notes.	Sight Drafts	Legal.	SPECIAL OR CONTRACT	Judgments Years.	Notes. Years.	Open Accts. Years.
Alabama.....	No	No	8	8 per ct.	20	6*	3
Alaska.....	No	No	8	12 per ct.	10	6	6
Arizona.....	No	No	6	10 per ct.	5	4	3
Arkansas.....	No	No	6	10 per ct.	10	5	3
California.....	No	No	7	No limit	5	4	4
Colorado.....	No	No	8	No limit	20	6	6
Connecticut.....	No	No	6	¶12 per ct.	(a)	(b)	6
Delaware.....	No	No	6	6 per ct.	10	6†	3
District of Columbia.....	No	No	6	10 per ct.	12	3	3
Florida.....	No	No	8	10 per ct.	20	5	3
Georgia.....	No	No	7	8 per ct.	7	6†	6
Hawaiian Islands.....	No	No	8	12 per ct.	20	6	6
Idaho.....	No	No	7	12 per ct.	6	5	4
Illinois.....	No	No	5	7 per ct.	20	10	5
Indiana.....	No	No	6	8 per ct.	20	10	6
Iowa.....	No	No	6	8 per ct.	20†	10	5
Kansas.....	No	No	6	10 per ct.	5	5	3
Kentucky.....	No	No	6	6 per ct.	15	15	2
Louisiana.....	No	No	5	8 per ct.	10	5	3
Maine.....	No	Yes	6	No limit.	20	6-20	6
Maryland.....	No	No	6	6 per ct.	12	3	3
Massachusetts.....	No	Yes	6	No limit.	20	6	6
Michigan.....	No	No	5	7 per ct.	6	6	6
Minnesota.....	No	No	6	10 per ct.	10	6	6
Mississippi.....	No	No	6	8 per ct.	7	6	3
Missouri.....	No	No	6	8 per ct.	10	10	5
Montana.....	No	No	8	No limit.	10	8	5
Nebraska.....	No	No	7	10 per ct.	5	5	2
Nevada.....	No	No	7	No limit.	6	6	4
New Hampshire.....	No	Yes	6	6 per ct.	20	6	6
New Jersey.....	No	No	6	6 per ct.	20	6	6
New Mexico.....	No	No	6	12 per ct.	7	6	4
New York.....	No	No	6	¶6 per ct.	20	6	6
North Carolina.....	No	No	6	6 per ct.	10	3*	3
North Dakota.....	No	No	6	10 per ct.	10	6	6
Ohio.....	No	No	6	8 per ct.	5	15	6
Oklahoma.....	No	No	6	10 per ct.	1-5	5	3
Oregon.....	No	No	6	10 per ct.	10	6	6
Pennsylvania.....	No	No	6	6 per ct.	5	6†	6
Philippine Islands.....	No	No	6	No limit.	.....	.....	.....
Porto Rico.....	No	No	6	12 per ct.	5	3	3
Rhode Island.....	No	Yes	6	No limit.	20	6	6
South Carolina.....	No	No	7	8 per ct.	10	6	6
South Dakota.....	No	No	7	12 per ct.	20	6	6
Tennessee.....	No	No	6	6 per ct.	10	6	3
Texas.....	Yes	Yes	6	10 per ct.	10	4	2
Utah.....	No	No	8	12 per ct.	8	6	4
Vermont.....	No	No	6	6 per ct.	8	6	6
Virginia.....	No	No	6	6 per ct.	20	5*	5
Washington.....	No	No	6	12 per ct.	6	6	3
West Virginia.....	No	No	6	6 per ct.	10	10	5
Wisconsin.....	No	No	6	10 per ct.	6-20	6	6
Wyoming.....	No	No	8	12 per ct.	21	10	8

¶ Any rate of interest on call loans of \$5,000 or upward, on collateral security.

(a) No limit. (b) Negotiable notes, 6 years. * Under seal, 10 years.

† Under seal, 20 years. ‡ In Courts of Record, 20 years; Justice's Court, 10 years.

¶ Over 6 per cent. cannot be collected by law.

Interest, conflict of laws. A contract valid where made is valid everywhere. Thus a resident of one state may authorize an agent in another state where there is no limit upon the rate of interest to execute a note in his name in that state and the note so made is a valid obligation, although, if executed in his own state would be void for usury.

Thompson v. Erie R. R. Co., 147 App. Div. 8; 207 N. Y. 171; see also Western Co. v. Kilderhous, 87 N. Y. 430; Whitehead v. Heidenheimer, 57 App. Div. 590.

Where a resident of Illinois sent to a resident of New York a ten per cent. note in payment of a debt due the latter, it was held that the usurious character of the note was to be determined by the laws of the State of Illinois, though it was payable in New York.

Sheldon v. Hoxton, 91 N. Y. 124; Agricultural Bank v. Sheffield, 4 Hun. 421.

But a note made in New York State and payable there, specifying no rate of interest, no intention existing that it will be discounted elsewhere, is controlled by the laws of that state, and if first discounted in another state at a rate of interest lawful there, but illegal in New York, it may be invalid for usury.

Dickinson v. Edwards, 77 N. Y. 573; Claves v. Hooker, 4 Hun. 231.

Where a note is sent to one state for negotiation and had its inception in that state, the fact that it was signed in another state does not require that the laws of the latter state shall govern the rate of interest thereon.

Smith v. Dixon, 150 App. Div. (N. Y.) 571; Wayne Co. Bank v. Low, 81 N. Y. 566.

A note which is dated and payable in Florida is regarded as a Florida contract so far as the defense of usury is concerned, though it is made and executed in New York.

Cutler v. Wright, 22 N. Y. 472.

Subd. 3.—As to authority to fill in date, see notes to Sec. 33.

It is well settled that a note payable on demand and a note payable on demand after date are, for the purpose of the running of the Statute of Limitations, deemed due and payable respectively on the day of the date of the note and the day following without demand.

Hardon v. Dixon, 77 App. Div. (N. Y.) 241; Van Vliet v. Kanter, 139 App. Div. 604.

See notes under Subdivision 1, Sec. 25 and Sec. 33.

Subd. 4.—This is a general proposition applicable to all written contracts.

In a case of conflict the court will consider the whole instrument, and not one or more parts detached from the others.

Barkley v. Ellis, 45 N. Y. 107.

Where two clauses apparently repugnant may be reconciled by any reasonable construction, as by regarding one as qualification of the other, that construction must be given because it cannot be assumed that the parties intended to insert inconsistent provisions.

Miller v. Hannibal & St. Jo. R. R., 90 N. Y. 433.

Subd. 5.—See *Heise v. Bumpass*, 40 Ark. 547; *Dan. Neg. Int. Sec.* 131.

Subd. 6.—A note reading "Four months after date the Northwestern Straw Works promise to pay," etc., was signed

"The Northwestern Straw Works"

"E. R. Stillman, Treas."

"John W. Mariner."

While the note was ambiguous as to Mariner, parol evidence was admissible to show that he signed in a representative capacity, even as against a bona fide purchaser of the note before its maturity.

Germania Bank v. Mariner, 129 Wis. 544; see *Sec. 114*; *Germania Nat. Bank v. Mariner*, 129 Wis. 544.

Subd. 7.—See *Uelery v. Brohm*, 20 Colo. App. 544; *Kingsley v. Sampson*, 100 Ill. 54.

§ 37. Liability of person signing in trade or assumed name. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Variant.—The Wyoming statute omits the word "expressly."

In an action on a promissory note which was made payable to the National Publishing Company, a company which had no legal existence but was an assumed name used by the payee, he was estopped from alleging it was made payable to a fictitious payee.

Jones v. Home Furnishing Co., 9 App. Div. (N. Y.) 103.

A person may become a party to a bill or note by any mark or designation which he chooses to adopt as a substitute for his name, and where the

word "agent" is added to his name he, and not the undisclosed principal, is liable thereon.

Stackpole v. Arnold, 11 Mass. 27; *Manufacturers & Traders Bank v. Love*, 13 App. Div. (N. Y.) 561; *Dan. Neg. Int. Sec.* 304.

A person who sells commercial paper as his own is understood to warrant his title thereto to be good—and that the instrument is good. A co-partnership may exist and the parties to it be bound even though there is no firm name, if such name has been agreed upon—a name that fairly represents the company may be adopted, and by custom and use becomes its valid name.

M. N. Bank v. Gallaudet, 120 N. Y. 298.

§ 38. Signature by agent; authority; how shown. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Variant.—In the Kentucky statute the words "an agent duly authorized in writing" are substituted for the words "duly authorized agent" in the first sentence.

On the effect of the change, see *Finley v. Smith*, 165 Ky. 445.

"It is an acknowledged principle of the law of agency that a general power of authority given to an agent to do an act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested on the other side."

Bank of N. Y. v. A. D. & T. Co., 143 N. Y. 559.

"There is no reason which is founded on principle that can be given for not applying the same rule of agency to a cashier as to other persons occupying fiduciary relations. No person can act as an agent in a transaction in which he has an interest, or to which he is a party, on the side opposite to his principal. This must be so where the person dealing with the agent has knowledge of the facts. A person cannot deal with a cashier of a bank as an individual, in securing a draft and claim; after the draft is delivered it has become the transaction of the bank. To make the acts of the cashier valid, the transaction in which the draft is delivered must be a bank transaction, made by the cashier, within his express or implied authority in the conduct of the business of the bank. So long as a person deals with the cashier in a matter wherein, as between himself and the cashier, he is dealing with, or has a right to believe he is dealing with, the bank, the transaction is obligatory upon the bank. The cashier is pre-

sumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank itself, or which are usually or customarily done, or held out to be done, by such an officer. But the test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business."

Clafin v. Bank, 25 N. Y. 293; *Moore v. Bank*, 111 U. S. 164.

A married woman stands at law on the same footing as if unmarried, and therefore may authorize her husband as agent to make for her negotiable paper.

Noll v. Kinney, 106 N. Y. 74.

Authority of corporation officers to make notes.

\$2500	Yonkers, N. Y. June 1, 1917
Six months	after date we promise to pay to
the order of Frank E. May	
Two thousand five hundred	Dollars
at First Nat. Bank	
Value received	Ardsley Hall Co.
No. _____	Thos. L. Cochran Jr. Treas.

In the foregoing illustration, if Cochran was not authorized by a resolution of the board of directors it could not be considered a corporation obligation. While the treasurer of a corporation is its fiscal officer, and prima facie, checks, drafts and notes issued in the business of the corporation, signed by him as such officer, are the obligations of the corporation, for they are acts which such an officer would ordinarily perform.

In *Miners & Merchants Bank v. Ardsley Co.*, 113 App. Div. 199 the court said:—

"The evidence was clearly insufficient to justify or sustain a finding that the defendant held its treasurer out as authorized to make promissory notes, or its president to negotiate notes so made, or that it ratified the acts of the treasurer in issuing or of the president in negotiating this note. There was no course of dealing or holding out these officers as authorized by which the defendant could be held liable on the theory of implied authority, or on the theory of estoppel. It is doubtful whether the by-laws conferred authority on the treasurer to issue promissory notes of the company, even when countersigned by the president, with action of the board of directors; but that point need not be decided for it is quite clear that, in any event, it only authorized the issuance of its promissory notes when signed by the treasurer and countersigned by the president.

There seems to be a distinction between actions on promissory notes of business and religious corporations with respect to what evidence is sufficient to establish a prima facie case that the paper was issued by authority of the defendant. (People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512; Karsch v. Pottier & Stymus Mfg., etc., Co., 82 App. Div. 230.) The weight of authority, however, is to the effect that a recovery cannot be had against either a religious or a business corporation on commercial paper unless the evidence taken as a whole shows or warrants a finding not only that the paper was issued by officers of the corporation, but that its issuance was authorized by the by-laws, or by a resolution of the board of directors, or by a course of dealing by which the corporation held them out as authorized to issue it, and would be deemed estopped from questioning their authority or of ratification by the acceptance and retention of some benefit or advantage from the unauthorized act or otherwise. (Dabney v. Stevens, 2 Sweeney, 415, 425; *affd.* on this point, 46 N. Y. 681; People's Bank v. St. Anthony's R. C. Church, *supra*; Bangs v. National Macaroni Co., 15 App. Div. 522; National Bank of Newport v. Snyder Mfg. Co., 107 id. 95; National Bank v. Navassa Phosphate Co., 56 Hun. 136; McCullough v. Moss, 5 Den. 567; Greene v. Iroquois Hotel & Apartment Co., 84 N. Y. Supp. 591; Davis Sewing Machine Co. v. Best, 105 N. Y. 59). Proof of such authority in the case of a corporation is what is shown in the case of an individual or co-partnership by proof of the genuineness of the signature. The rule is deemed essential to protect corporations against the unauthorized and fraudulent acts of its officers; and those taking negotiable paper purporting to be the paper of a corporation must ascertain at their peril, if they take it relying upon the credit of the maker, whether it was authorized. (De Bost v. Albert Palmer Co., 35 Hun, 386; Cheever v. Pittsburgh, etc., R. R. Co., 150 N. Y. 59, 65.)"

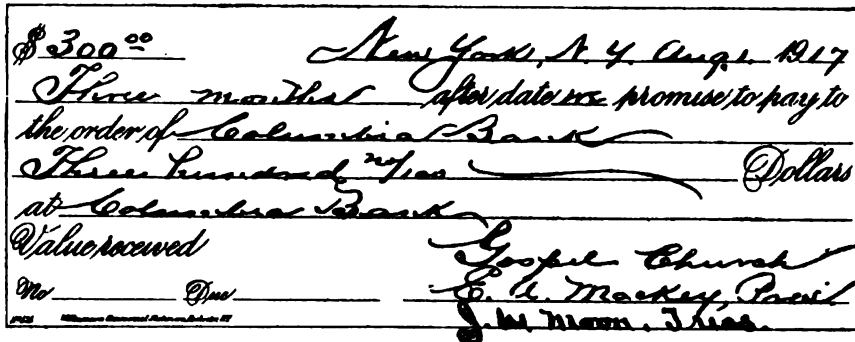
Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent.

Eastern R. R. Co. v. Benedict, 5 Gray, 566. See also, Stackpole v. Arnold, 11 Mass. 27; Sumwalt v. Rigely, 20 Md. 107; Briggs v. Partridge, 64 N. Y. 363; Manufacturers & Traders Bank v. Love, 13 App. Div. 564.

Where a negotiable promissory note given for the debt of a corporation, the language does not disclose the corporate obligation, and the signatures to it are in the names of individuals who were officers of the corporation, a *bona fide* holder without notice of the circumstances of its making, is entitled to hold it as the personal undertaking of its signers, although they have affixed to their names the title of their respective offices. Such title will be regarded as descriptive of the persons.

C. N. Bank v. Clark, 139 N. Y. 307; First Nat. Bank of Brooklyn, 84 Hun. 376; Bush v. Gilmore, 45 App. Div. (N.Y.) 89.

Powers of officers to bind a corporation.



Proof that a promissory note purporting to be made by a religious corporation was signed by its president and treasurer, does not show that it is the note of the corporation, without proof that it was made by its authority. An agency can neither be created nor proved by the acts or declarations of the assumed agent alone. In an action against a corporation, the presumption that its officers have done their duty does not stand for proof of authority, in a matter outside of their official duties, and where special authority must have been confessed to justify the act. In the above illustration unless Mackey and Moon had authority from the board or authority under the articles of incorporation, or by the by-laws of the corporation, their act would not bind the corporation. They have no separate authority to bind it, even though assented to by a majority with authority, acting singly outside of a corporate meeting. A person taking the paper of a corporation is bound to inquire as to the power of the officers executing the same to contract.

Columbia Bank v. Gospel Church, 127 N. Y. 361; People's Bank v. St. Anthony's Church, 109 N. Y. 512.

\$ 15.000	St. Louis, Mo., July 28, 1901
On June 28,	after date, we promise to pay to
the order of Ed. Hogaboom	
Fifteen hundred	no/100 Dollars
at Fourth Nat. Bank, St. Louis.	
Value received, with interest	The Park Hotel Co.
For	By Ed. Hogaboom, Pres.

(INDORSED)

ED. HOGABOOM.

The general authority of a president of a business corporation to make and discount notes gives him no power to make a note of the corporation payable to his own order, and one who discounts such a note cannot recover thereon against the corporation without showing special authority for its execution. An act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is notice of the fact that it is without the scope of his general powers. The form of the foregoing note carries notice to the purchaser of a possible want of power and sufficient to put him on guard. There is another reason why this note is not binding on the hotel corporation. It is that it was an accommodation note, that the bank had notice of that fact when it discounted the paper, and that it was beyond the powers of the corporation to make a note of that character.

Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742; Bank v. Armstrong, 152 U. S. 346; Claflin v. Bank, 25 N. Y. 293; Bank v. Wagner, 20 S. W. (Ky.) 535; Smith v. Association, 78 Cal. 289; 20 Pac. 677; Nat. Park Bank v. G. A. M. Co., 116 N. Y. 281; Aetna Bank v. Charter Oak Co., 50 Conn. 167; Nat. Bank v. Globe Works, 101 Mass. 57; Davis v. R. R. Co., 131 Mass. 258; Lucas v. Transfer Co., 70 Iowa 541; Bank v. Kennedy, 167 U. S. 362.

As to religious or other corporations, not engaged in business, a business act which charges them with liability must have been shown to have been authorized before the liability will attach.

People's Bank v. St. Anthony's Church, 109 N. Y. 512.

When an agent abandons the object of his agency and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as agent.

Shipman v. Bank of New York, 126 N. Y. 318, 331, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Welsh v. German-American Bank, 73

N. Y. 424, 29 Am. Rep. 175; *Allen v. South Boston R. Co.*, 150 Mass. 200, 206, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185.

While it is well settled that a principal is responsible for the frauds of his agent while acting within the scope of his authority, it is equally well settled that the principal is not responsible for the fraudulent acts of his agent committed outside the scope of his authority and for his own personal advantage.

Taylor v. Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 Am. St. Rep. 564; *Henry v. Allen*, 151 N. Y. 1, 11, 45 N. E. 355, 36 L. R. A. 685; *Cushman v. Amend*, 103 N. Y. Supp. 45.

The authorities very generally hold that an agent with general authority to manage the business of his principal has not, by reason thereof, implied power to indorse or execute negotiable paper.

1 Am. & Eng. Ency. of Law, 1030; *Jackson Co. v. Commercial Bank*, 199 Ill. 151, 65 N. E. 136; *Pluto Powder Co. v. Cuba Bank*, 153 Wis. 324; *Deering Co. v. Kelso*, 74 Minn. 41, 76 N. W. 792.

The authority of an agent to a particular act in connection with a transaction may be inferred from proof that his principal authorized or ratified similar acts in connection with past transactions.

Cartage Co. v. Cox, 74 Ohio St. 284; *Antrim v. Anderson*, 140 Mich. 702; *Union Stock Yards v. Mallory*, 157 Ill. 554.

As to proof of authority of agent see:

In re Estate of Chismore, 166 Ia. 217; *Scotland National Bank v. Hohn* (Mo.) 125 S. W. 539; *Eldredge v. Husted*, 22 Misc. 534; *Grant County Bank v. N. W. Land Co.*, 28 N. D. 479.

The extent to which a principal shall authorize his agent is completely within his determination, and a party dealing with the agent must ascertain the scope and reach of the powers delegated to him, and must abide by the consequences if he transcends them. A power of attorney, like any other contract, is to be construed according to the natural meaning of the words in view of the purpose of the agency and the needs to its fulfillment. The authority within it under such construction is not to be broadened or extended.

Porges v. U. S. M. & Trust Co. 203 N. Y. 181.

The purpose of a written power of attorney is not to define the authority of the agent, as between himself and his principal, but to evidence the authority of the agent to third parties with whom the agent deals.

Keyes v. Metropolitan Trust Co., 220 N. Y. 237; *Watson v. Cleveland*, 21 Conn. 538; *Wimberly v. Windham*, 104 Ala. 409; *Fitzbaugh v. Spunangle*, 118 Ia. 341; *Hallady v. Underwood*, 90 Ill. App. 130.

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I,
 of, have made, constituted and ap-
 pointed, and by these presents do make, constitute and appoint.....
 of true and lawful attorney for
 and in name, place and stead:

1. To draw checks against account in the
 Bank.

2. To endorse notes, checks, drafts or bills of exchange which may
 require endorsement for deposit or for collection in said bank.

3. To borrow money from the said bank and to execute, seal and deliver
 any notes, bonds or other instruments in writing necessary therefor, and to
 assign as collateral security stocks, bonds, warehouse receipts or other personal
 property.

4. To endorse any paper may offer said bank for discount.

5. To draw and accept all drafts or bills of exchange.

6. To waive demand, protest and notice of protest on all notes, checks
 drafts or bills of exchange.

7. To do all lawful acts requisite for effecting these premises, hereby
 ratifying and confirming all that the said attorney shall do therein by virtue
 of these presents.

It is understood and agreed that this power shall stand irrevoked and in
 full force until notice thereof shall be given, in writing, by
 or legal representatives to said Bank.

In witness whereof, have hereunto set hand and
 seal this day of, in the year of our Lord one thousand
 nine hundred and

.....(Seal)

Signed, sealed and delivered in the presence of

.....

REVOCATION OF POWER OF ATTORNEY

To the.....Bank,

Dear Sirs:

Please take notice that the undersigned hereby revokes a certain power of attorney heretofore made and executed on theday of 19....., wherein and whereby oneofwas made, constituted and appointed due and proper attorney to perform certain acts therein more particularly described, holding you harmless from all acts which may have been heretofore done by you pursuant to the said power of attorney and previous to the receipt of this notice of revocation.

Dated theday of19.....

§ 39. Liability of person signing as agent. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Variants.—The Virginia Statute adds the words: “without disclosing his principal” after the word “capacity.”

A promissory note signed “Annie M. Phillips, Admr.” constitutes an individual obligation of the said Annie M. Phillips, the word “Admr.” being simply descriptive.

Jenkins v. Phillips, 41 App. Div. (N. Y.) 389.

The same rule applies to notes signed “guardian,” “trustee,” “secretary,” etc.

Bank v. Looney, 99 Tenn. 278; Schmittler v. Simon, 114 N. Y. 186; Daniel v. Glidden, 38 Wash. 556.

An agent, who on behalf of his principal, purchases property and delivers to the vendor in payment thereof a promissory note signed with his own name to which he added the word “Agt.” is not personally liable, where it appears that the vendor accepted the note, with knowledge

that the agent was not acting in his individual capacity but as agent for another.

Crandall v. Rollins, 83 App. Div. (N. Y.) 618; *Sumwalt v. Rigley*, 20 Md. 107.

When one knowingly and without dissent permits another to act as his agent, the capacity will be conclusively presumed.

Joyce v. Rohan, 111 N. W. (Ia.) 319.

If an agent signs a note with his own name alone and there is nothing on its face to show that he is acting as agent, he is, and his principal is not, personally liable.

Burkhalter v. Perry, 127 Ga. 438; *N. Y. Life Ins. Co. v. Martindale*, 88 Pac. (Kan.) 559; 121 Am. St. Rep. 362.

Where the bank discounting note as above had knowledge of the intention of the signers, see *First National Bank v. Wallis*, 150 N. Y. 458; *Second Nat. Bank v. Midland*, 155 Ind. 581. A trustee of an insolvent firm, for the benefit of the creditors thereof, appointed by such firm and its creditors, is not personally liable under this section, upon a note signed by him as "Trustee."

Mogowan v. Peterson, 173 N. Y. 1. See also, *Kerby v. Ruegamer*, 107 App. Div. (N. Y.) 491; *Jump v. Sparling*, 218 Mass. 344; *Meyers v. Chesley*, 177 S. W. Rep. 326.

An owner contracted for the erection of certain buildings. During the work the premises were conveyed to trustees for creditors, for the purpose of completing the buildings. A sub-contractor, with knowledge of the facts, agreed with the trustees to do certain work on the buildings, and received a note therefor, signed by the trustees in their individual names, followed by the words "as trustees, etc." There was evidence that, when the note was given, the sub-contractor was informed that the trustees would not incur personal liability. Held, that the trustees were not bound individually, though the note did not on its face disclose that its consideration was for the benefit of the creditors of the owner, and that it was given by the trustees as trustees for the creditors.

Kerby v. Ruegamer et al., 95 N. Y. Supp. 408; *Nat. Bank v. Wallace*, 150 N. Y. 455; *Megowan v. Peterson*, 173 N. Y. 1; *Kirby v. Ruegamer*, 107 App. Div. 491. For exception to the rule see Sec. 72.

Where the name of a religious corporation indorsed upon its promissory note is followed by the names of its president and treasurer, the words "finance committee" and the names of the persons constituting such committee, the indorsement comes within the protection of this section, and negatives any personal liability on the part of the individual signers.

Cheslee Ex. Bank v. First U. P. Church, 89 Misc.

\$1750	Boston, Mass. Aug. 19 1914
Thirty days	after date, we promise to pay to
the order of ourselves	
Seventeen hundred & fifty	Dollars
at Chelsea Exchange Bank	
Value received	First United Presbyterian Church
Mr. _____	Past. John Elliott
Treas. _____	Treas. Edward A. Shea

(INDORSEMENT)

FIRST UNITED PRESBYTERIAN CHURCH

JOHN ELLIOTT, PRES.

EDWARD A. SHEA, TREAS.

JOHN ELLIOTT,

EDWARD A. SHEA, Finance Committee.

JOHN MCKEE,

In an action against John Elliott, Edward A. Shea and John McKee as indorsers, held that the note was complete and unambiguous in form, and nowhere does it import more than a corporate obligation and no personal liability attached.

Chelsea Ex. Bank v. First U. P. Church, 89 Misc. 619; see also Falk v. Moebis, 127 U. S. 597; Carpenter v. Farnsworth, 106 Mass. 561; Libscher v. Kraus, 74 Wis. 387; Farmers & Mechanics Bank v. Colby, 64 Cal. 352; Atkins v. Brown, 59 Maine 90; Castle v. Belfast, 72 Maine 167; Lathan v. Houston Mills, 3 S. W. (Tex.) 462; Hitchcock v. Buchanan, 105 U. S. 416; Collins v. Buckeye Ins. Co., 17 Ohio St. 215.

Where a person signs a promissory note adding the word "agent" after his name, and there is nothing on the face of the instrument to show that he does not intend to be bound thereby, he is personally liable, the word "agent" being merely descriptive of the person so signing.

Casco Bank v. Clark, 139 N. Y. 307; Burkhalter v. Perry, 127 Ga. 438; Tradesmen Bank v. Looney, 99 Tenn. 278.

Liability of a person signing as trustee.

\$ 693	Brooklyn, N.Y. Dec. 28. 1909
Three months	after date I promise to pay to
the order of C. Stevens & Co.	
Six hundred ninety three	no/100 Dollars
at Kings County Bank	
Value received	
No.	Chas. E. Peterson
Per	Trustee

Stevens Company upon the trial introduced the note in question in evidence, the signature being admitted and then rested. The defendant showed that prior to the making of the note Peterson called a meeting of his creditors and at such meeting the creditors, among which were Stevens Company, assembled executed a paper, appointed Peterson as sole agent and trustee for the benefit of all creditors.

Under these facts the court held that Peterson was acting as trustee for the creditors and no personal liability attached.

The signature in which the name of the principal followed by the word "by" or "per" _____ agent, is regarded as the proper method of disclosing the agency, and imposes no personal liability on the person so signing as agent. A note in the following form is the contract of Harry A. Sampson and not John Lockwood.

\$ 600	Toledo, O. July 1. 1917
Six months	after date I promise to pay to
the order of Samuel Wray	
Six hundred	no/100 Dollars
at First National Bank	
Value received with interest	
No.	Harry A. Sampson
Per	By John Lockwood, Agent

In order to relieve an agent from liability upon an instrument, executed by him within the scope of his authority and agency, he must not only name his principal but must express by some form of words that the liability is that of the principal though done through the agent. A mere description of the general relation of office with the person signing the

paper bears to another person, without indicating that the particular signature is made in the execution of the agency, is not sufficient to charge the principal or exempt the agent from personal liability.

Petz v. Stanton, 10 Wend. 271; Guthrie v. Imbrie, 6 Pac. 661; 53 Am. Rep. 331; Kansas Nat. Bank v. Day, 62 Kan. 692; Shoe & Leather Bank v. Dix, 123 Mass. 148; Means v. Stormwood, 32 Ind. 87.

\$ 201 93/100	Buffalo N.Y. May 3. 1905
Two months	after date I promise to pay to
the order of Rice Lumber Co.	
Two hundred one	93/100 Dollars
at Bank of Buffalo	
Value received	
No.	Per J. R. Johnson, Agent

This note only binds the ostensible maker, though the word "agent" is attached to his signature, no principal being named in the body of the instrument, or indicated by the signature. A party is not bound to search for a principal unknown to the instrument itself. The rights of the holder are confined to the parties to the instrument, and he must rely upon them alone, except he can establish that the name used as the signature to the instrument has been adopted by the assumed principal or by the person not named in the instrument as his own in transacting the business.

Manufacturers & Traders Bank v. Love, 13 App. Div. (N. Y.) 564; Casco Bank v. Clark, 139 N. Y. 307.

\$ 2000 00	Hobart N.Y. July 29. 1909
One year	after date I promise to pay to
the order of William L. Moore	
Two thousand	Dollars
at National Bank of Stamford	
Value received with us	
No.	Per W. L. Moore, Pres. D. C. Sharp, Treas. of the Hobart Horse and Cattle Show Assoc.

But in the foregoing case the descriptive words following the signature of the makers suggest the possibility that the Hobart Horse and Cattle Show Association might have intended thereby to make the promise, and

as the action was between the original parties to the note, it was competent for the defendants to show that there was a corporation by that name; that the makers were president and secretary; that the corporation had the benefit of the consideration; that the makers were authorized to make the note as the act of the corporation, and intended to do so, and that plaintiff's testator at the time he received the note knew these facts and took the note with the understanding that the corporation was its maker. Such evidence would not contradict the note, but would give further and permissible meaning to the addendum to the signatures of the makers, and tend to show that such addendum was made as the corporate execution of the note, and was understood by both parties to it.

Bush v. Gilmore, 45 App. Div. 89; *Bank of Genesee v. Patchin*, 19 N. Y. 312; *Groves v. Acker*, 85 Hun. 492; *Schmittler v. Simon*, 114 N. Y. 176, 186.

Ward Electric & Mfg. Company	
\$ 7500 ⁰⁰	Rochester N.Y. June 1 st 1917
Three months after date we promise to pay to	
the order of Clark & Chapman Inc. Inc.	
Seven thousand five hundred Dollars	
at Mechanics Bank	
Value received	John Clark, Pres.
Per _____	E. H. Closser, Treas.

Where a negotiable promissory note, given for the debt of a corporation, the language of the promise does not disclose the corporate obligation, and the signatures to it are in the names of the individuals, who were in fact officers of the corporation, a bona fide holder, without notice of the circumstances of its making, is entitled to hold it as the personal undertaking of its signers, although they have affixed to their names the title of their respective offices, this will be regarded as descriptive of the persons and not of the character of liability. This is the rule even though the corporation name is printed on the margin of the note.

C. N. Bank v. Clark, 139 N. Y. 312; *Belmont Dairy Co. v. Thrasher*, 124 Md. 320; *Daniel v. Glidden*, 38 Wash. 556; *Hayes v. Matthews*, 63 Ind. 412; *Burlingame v. Brewster*, 79 Ill. 512.

But in *First Nat. Bank v. Wallis*, 150 N. Y. 455, as between the original parties, it was held that if the bank, when it discounted the paper, was informed or knew that the note was issued by the corporation, and was intended to create a corporate liability, it could not be enforced against the defendants as individuals, who, by mistake had executed it in

such form as to make it on its face their own note, and not that of the corporation. But nothing short of notice, express or implied, brought home to the bank at the time of the discount, that the note was issued as the note of the corporation, and was not intended to bind the defendants, could defeat its remedy against the parties actually liable thereon as promisors.

See also *Higgins v. Ridgway*, 153 N. Y. 130; *Baird v. Baird*, 145 N. Y. 659, 664; *Schmitter v. Simon*, 114 N. Y. 176.

Notes of a corporation signed with its corporate name "by Henry O. Narstead, President, J. E. Schultz," the latter name being that of its secretary, by their terms impose a personal liability on him.

Exchange Bank v. Schultz, 149 N. W. 99.

§ 40. Signature by procuration; effect of. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

Variant.—The Illinois statute omits the word "only" after "bound."

The term "procuration" is seldom used in this country, but is frequently used in England; this section being taken from the English Bill of Exchange Act.

Byles on Bills, 33; Dan. Neg. Inst., Sec. 280.

§ 41. Effect of indorsement by infant or corporation. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

Variant.—The North Carolina statute adds the words "or married woman" after the word "infant" in both instances.

The defense of infancy is a personal one, and the defense *ultra vires* on the part of the corporation being intended for the benefit of the stockholders cannot be taken advantage of by third parties.

As to the transfer of negotiable paper by infants, see:

Roach v. Woodhall, 91 Tenn. 206; Dan. Neg. Inst., Sec. 682.

As to transfer by corporations, see:

Willard v. Crook, 21 App. Div. (N. Y.) 237; Hess v. Sloane, 66 App. Div. (N. Y.) 522; North Hudson v. Hudson Bank, 11 L. R. A. 845; People's Bank v. St. Anthony's Church, 109 N. Y. 512; Notes to Sec. 55.

A treasurer of a manufacturing company has no power to make promissory notes in its name unless such power is expressly given to such officer by the by-laws of the corporation or by resolution of its board of directors, and one who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority.

Jacobus v. Jamestown Mantel Co., 211 N. Y. 161; People's Bank v. St. Anthony's Church, 109 N. Y. 525; Westchester Mtg. Co. v. McIntyre, 157 N. Y. Supp. 726.

\$12500 ⁰⁰	New York, Aug 2.	1916
Six months	After date we promise to pay to	
the order of ourselves		
Twelve thousand five hundred	Dollars	
at National Park Bank		
Value received with use		
For	Squires Taylor & Co.	

Squires, Taylor & Co., the makers and payees of said note, indorsed it in blank and thereupon it was indorsed, "German American Warehousing Co., Robert Squires, President." This note was then discounted and the avails credited to Squires, Taylor & Co. The fact that the maker of a promissory note procures it to be discounted for his own benefit is unexplained notice to the discounter that the indorsement is not in the usual course of business but it is for the accommodation of the maker.

National Park Bank v. German American Warehousing Co., 116 N. Y. 393; Hendrie v. Berkowitz, 37 Cal. 113; Bloom v. Helm, 53 Miss. 21; National Bank v. Globe, 101 Mass. 57; Davis v. Old Colony R. R. Co., 131 Mass. 258; Culver v. Reno Co., 91 Penn. 367.

A manufacturing corporation has no power to make or indorse notes for the accommodation of others. (National Park Bank of N. Y. v. Rural Home Co., 90 Hun. 365; 157 N. Y. 684.) One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority. (Alexander v. Cauldwell, 83 N. Y. 480.) Notwithstanding the general rule stated, a corporation is bound if it makes or indorses commercial paper for the accommodation of another in respect to a bona fide holder who discounts it before maturity on the faith of its being business paper. (Mechanics' Banking Association v. N. Y. & S.

White Lead Co., 35 N. Y. 515.) The decision in the White Lead Co. case (supra) and other similar decisions are based upon the assumption that the officers making or indorsing a promissory note had authority from the corporation to make and indorse such notes in the ordinary course of its business. Such decisions do not apply to a case where the officers purporting to act for a corporation do not have authority to sign commercial paper in the ordinary course of its business. A treasurer of a manufacturing corporation has no power to make promissory notes in its name unless such power is expressly given to such officers by the by-laws of the corporation or by resolution of its Board of Directors. (Thompson on Corporations (2d ed.), Sec. 1564; Daniels on Negotiable Instruments (5th ed.), vol. 1, Sec. 394; Edwards on Bills, Sec. 65; Beach on Private Corporations (2d ed.), vol. 2, Sec. 804; National Bank of Newport v. Snyder Mfg. Co., 107 App. Div. 95; Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 261; National Bank of the Republic v. Navassa Phosphate Co., 56 Hun. 136; People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512.)

§ 42. Forged signature; effect of. Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Variant.—The Illinois statute omits the words “of the person whose signature it purports to be.”

See Section 326.

Where a contract is evidenced by several writings, all of which are material to show the actual agreement of the parties, the fraudulent alteration of any of them by one of the parties invalidates all, as against the other.

Meyer v. Hunckee, 55 N. Y. 412.

The same rule would apply on alteration of any material part of a negotiable instrument.

First National Bank v. Allen, 100 Ala. 476; De Feriet v. Bank of America, 23 Ia. Ann. 310; Danna v. National Bank of the Republic, 132 Mass. 156; Morgan v. U. S. Mortgage Co. 208 N. Y. 218; Meyers v. S. W. National Bank, 193 Pa. St. 1; Weinstein v. National Bank, 69 Texas 38; Leather Manufacturers' Bank v. Morgan, 117 U. S. 96.

The agent of the plaintiff was authorized to draw checks against plaintiff's account in the defendant bank. The agent drew a number of checks, payable to various persons with whom the plaintiff had business

dealings. The agent forged the indorsement of the payees on these checks and procured the money thereon directly from the bank, or by negotiating them to others. It was held that the bank was not liable for the amount thus wrongfully secured by the agent, for the reason that the bank was misled through the fault of the plaintiff.

Litchfield Shuttle Co. v. Cumberland Valley National Bank, 183 S. W. Rep. 1006.


The agent of the plaintiff had power of attorney to receive and indorse checks for the purpose of deposit in a specified bank. He received such checks, indorsed them with the name of the payee, adding his own indorsement, and transferred them to a broker having knowledge of such agency. The checks were thereafter deposited in the broker's bank, not the bank where the agent was authorized to make deposits. In an action for conversion held, that the broker having knowledge of the agency would have been liable. The bank, however, was not liable, having no knowledge to impeach the checks which were regular on their face.

Salen v. Bank of State of N. Y., 110 App. Div. (N. Y.) 636.

The rule as laid down in Salen v. Bank of State of N. Y. is not applicable when the agent has authority to indorse checks for the purpose of deposit in a designated bank, and which checks he deposits to his own account in said bank. The authority to indorse and deposit to the principal's account does not authorize a deposit to his own account, and a bank is bound to make inquiry as to the extent of his authority.

Schmidt v. Garfield National Bank, 64 Hun. 298; Wilson v. Metropolitan R. R., 120 N. Y. 145.

GENESEE VALLEY TRUST COMPANY

Rochester, N. Y. Jan 1, 1916
Christian A. Schmidt Co. \$310.00
Three hundred ten and no/100 Dollars

John M. James

(INDORSED)

C. A. SCHMIDT CO.
 GEORGE LINGARD

Christian A. Schmidt Company employed one Lingard, authorizing him to indorse checks and drafts for deposit, and furnished him a stamp

reading "For deposit in the Chemical National Bank to the credit of _____," which it was his custom to use in indorsing paper for deposit and to place his signature under this indorsement. Lingard indorsed a large amount of paper, "Christian A. Schmidt Co.—George Lingard," not using the stamp, and deposited the paper to his own credit in his own bank, from which he afterwards drew out the proceeds and converted them to his own use. In an action brought by Schmidt Co. against his bank to recover the amount of such checks, held—that he could recover. The check was drawn payable to the order of Schmidt Co. and when deposited by Lingard in the defendants' bank they were indorsed with the names of Schmidt Co. and Lingard in Lingard's handwriting. The officers of the bank, therefore, knew that Schmidt Co.'s name had not been indorsed upon the check by Schmidt Co., but had been indorsed by Lingard. In receiving the checks and paying the proceeds thereof to Lingard the officers of the bank acted at their peril; they knew that Lingard had indorsed the checks with plaintiff's name, and, unless they were satisfied to take the risk of paying the proceeds to Lingard, they were bound to make inquiry as to the extent of his authority.

Schmidt Co. v. Garfield National Bank, 64 Hun. p. 298, affirmed 138 N. Y., 631.

Where an officer or agent of a corporation makes a corporate obligation payable to himself, it bears upon its face sufficient notice of his incapacity to issue it, when he attempts to deal with it for his own benefit.

Hanover Bank v. Am. Dock & T. Co., 148 N. Y. 612; Bank of N. Y. etc. v. Am. Dock & T. Co., 143 N. Y. 559.

A drawer who pays money on forged checks, payable to bearer, relying on the unqualified indorsement of the holder presenting them, and who has been in the habit of cashing checks of the drawer whose name was forged, may recover of the indorser, when the mistake of the drawer has not been to the prejudice of the indorser.

Williamsburg Trust Co., v. Tune, 120 App. Div. (N. Y.) 518.

A bank which pays a check drawn on it, bearing payee's indorsement forged by an employee of the drawer, is liable to the drawer for the amount thus paid.

Metallurgical Co. v. Mechanics Bank, 157 Supp. 321.

The fact that one signature to a note is a forgery will not necessarily affect the liability of the other makers concerning the genuineness of whose signature there is no question; if the other makers signed with knowledge of the forgery, they cannot avail themselves of the fraud, but the rule would be different in case of innocent makers.

Beem v. Farrell, 135 Iowa 670; Geering v. Metropolitan Bank, 170 App. Div. (N. Y.) 751.

A by fraudulently representing himself to be B, obtained a check from C payable to the order of B. At the time C knew of the existence of B and delivered the check to A, supposing him to be B. A indorsed B's name on the check and gave it to D, who collected from the bank. In an action to recover from the bank the court said: "It is a fundamental rule that when a bank received money to be checked out by a depositor, it is to be checked out only as the depositor shall order. If therefore, it pays out money otherwise than according to such order, it is liable to the depositor for the amount so paid." Hence, if it pays money out on a forged signature, the depositor being free from blame or negligence, it must bear the loss.

First National Bank v. American Exch. National Bank, 170 N. Y. 88; Tolman v. American Bank, 22 R. I. 463; U. S. Portland Cement Co. v. U. S. National Bank (Or) 157 Pac. Rep. 202; Armstrong v. National Bank, 46 Ohio St. 512, 22 N. E. 866; German Savings Bank v. Citizens' Bank, 101 Iowa 530; Robertson v. Coleman, 141 Mass. 231.

This same rule applies to "travelers' checks."

Sullivan v. Knauth, 161 App. Div. (N. Y.) 148; Somberg v. Am. Express Co., 136 Mich. 639.

If the bill run to a fictitious payee it is as if drawn to bearer, and indorsement is not necessary. But if it be payable to some person known at the time to exist and present to the mind of the drawer when he made it as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary.

Rogers v. Ware, 2 Neb. 29; Rowe v. Putnam, 131 Mass. 281.

Where a transaction is contrary to good faith and the fraud affects individual interests only, ratification is allowed, but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs up is not permitted.

Christian, etc. v. Walton, 181 Pa. St. 201.

But in Massachusetts one ratifying a signature on a promissory note purporting to be his and which he knows to be forged is bound by it.

Central National Bank v. Copp, 184 Mass. 328; Traders' National Bank v. Rogers, 167 Mass. 315.

Authority to an agent to indorse checks in a specifically restricted manner, in order that they may be deposited to the account of the principal, does not confer upon the agent authority to indorse for any other purpose.

Schmidt v. Garfield National Bank, 64 Hun. 298, affirmed 138 N. Y. 631. Standard S. S. Co. v. Corn Exchange Bank, 84 Misc. 447.

Liability of savings banks.—A savings bank which pays a deposit on a series of forged drafts, presented by one in possession of the pass book, is not liable unless it is negligent in failing to detect the forgery. It is negligent only where the discrepancy between the genuine and forged signatures is so plain that an ordinary competent clerk, exercising reasonable care, should detect the forgery.

Noah v. Bank for Savings of N. Y. 157 Supp. 324; 171 App. Div. 191; Campbell v. Schenectady Savings Bank, 114 App. Div. (N. Y.) 337; Kelley v. Buffalo Savings Bank, 180 N. Y. 171, 69 L. R. A. 317; Appleby v. Erie Co. Savings Bank, 62 N. Y. 12; Robestein v. Franklin Savings Bank, 152 N. Y. Supp. 277; Krummel v. Germania Savings Bank, 127 N. Y. 488.

A savings bank, which pays a deposit to a person wrongfully in possession of the pass book, is responsible for the amount to the real owner of the deposit, where the difference between the genuine signature of the depositor and the forged signature, on which the payment was made, was "such as to be apparent to a man experienced in comparing handwriting." The bank is not protected in a case of this kind by a by-law to the effect that a payment made to a person presenting a deposit book shall be deemed to be made to the depositor.

Schneider v. Union Dime Savings Bank, 156 N. Y. Supp. 753.

Signature on corporate check.—A bank is liable in paying the check of a corporation, the signature on which does not conform to the signature on file at the bank.

Shoe Lasting Machine Co. v. Western National Bank, 79 N. Y. App. Div. 588, 75 N. Y. Supp. 627.

Where a person having possession of checks forged the name of the payee and then indorsed them himself and delivered them to plaintiff, who deposited them to his own account in a bank, the plaintiff obtained no title to the instruments and is not entitled to recover the deposit from the bank which, on discovering the forgery, cancelled the credit and reimbursed the bank upon which the checks had been drawn.

Gerling v. Metropolitan Bank, 170 App. Div. (N. Y.) 751.

Any person taking checks made payable to a corporation, which can act only by agents, does so at his peril, and must abide by the consequences if the agent who indorses the same is without authority, unless the corporation is negligent or is otherwise precluded by its conduct from setting up such lack of authority in the agent as in Phillips v. Mercantile National Bank of N. Y., 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596. The business man who authorizes his clerk to take his checks

to his bank for deposit does not vest in her so dangerous a power as to preclude him from setting up her lack of authority if she indorses his name thereon in blank and innocent persons cash the checks for her without inquiry. The stringent rules of agency and the arbitrary rules of the law of negotiable paper alike protect the principal from such unauthorized acts. If greater authority has been conferred, expressly or by implication, or if the principal has been negligent or has ratified the conduct of his agent, the law will not shield him.

Standard Steam Specialty Co. v. Conn. Exchange Bank 220 N. Y. 178, 116 N. E. 386.

See also, *Stein v. Empire Trust Co.*, 148 App. Div. (N. Y.) 851; *Oriental Bank v. Gallo*, 112 App. Div. 360; 188 N. Y. 610; *Seaboard National Bank v. Bank of America*, 193 N. Y. 26; *Critten v. Chemical National Bank*, 171 N. Y. 219; *First National Bank v. Whitman*, 94 U. S. 343; *Rauch v. Bankers' National Bank*, 143 Ill. 625; *Tibby Bros. v. F. & M. Bank*, 220 Pa. 1; 2 *Morse on Banking*, Sec. 477; *Coggill v. American Exchange Bank*, 1 N. Y. 113; *Dan. Neg. Int. Sec.* 1356; *Angelo S. A. Bank v. National City Bank*, 146 N. Y. Supp. 457.

Payments made upon forged indorsements are at the peril of the bank unless it can claim protection upon some principle of estoppel or by reason of some negligence chargeable to the depositor.

Crawford v. West Side Bank, 100 N. Y. 53; *Corn Ex. Bank v. Nassau Bank*, 91 N. Y. 80; *Phoenix Bank v. Risley*, 111 U. S. 125; *Citizens' Bank v. Importers' Bank*, 119 N. Y. 195; *Shipman v. Bank S. N. Y.*, 126 N. Y. 327.

Where one knowingly pays a note to which his name is forged, does not thereby render himself liable for other forgeries of his name by the same person, where those dealing with the forger have no knowledge that any forged paper has been paid and have not been injured or misled or deceived by such payment.

Murphy v. Skinner, 160 Wis. 554.

Estoppel.—Parties are often estopped from asserting defenses which might otherwise have been available in view of previous acts.

Buckley v. Collins (Ark.), 177 S. W. 920; *Curtin v. Mining Co.*, 141 Cal. 308; *Beatty v. College*, 177 Ill. 280; *Van Slyke v. Rooks*, 181 Mich. 88; *Bank v. Merkle*, 97 Miss. 824; *Monongahela Bank v. Weston*, 172 N. Y. 259.

Thus, an indorser may be estopped to set up against a bona fide holder that the signature of the maker, drawer or prior indorser is a forgery.

Richards v. Street, 31 App. D. C. 427.

And an indorser whose signature is alleged to be forged thereafter signs a waiver of notice indorsed on the note is thereafter estopped from denying the signature.

Bowie v. Hume, 13 App. D. C. 286; Beem v. Farrell, 135 Iowa, 670; Turnbull v. Bowyer, 40 N. Y. 456.

A bank is relieved from responsibility for raised checks which it has paid after the account was balanced, by the negligence of the depositor in the examination of the returned vouchers and comparison with the stubs of his check book, which would have disclosed the alterations and prevented subsequent frauds.

Critten v. Chemical National Bank, 171 N. Y. 220.

Silence of the person whose signature is alleged to be forged will work an estoppel on the theory, "He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent."

Tobias v. Morris, 126 Ala. 535; Rothchild v. Title G. & T. Co., 204 N. Y. 458.

Where a depositor learns through the examination of his returned checks or otherwise that a paid check returned as a voucher has been forged as to the signature, or has been altered in any particular, it becomes his duty to give notice to the bank without delay, and failure to do so and the bank is misled to its injury, the bank will not be held liable for the loss.

Leather Mfrs. National Bank v. Morgan, 117 U. S. 96.

The burden of proof is on the bank to prove that it has been injured by the neglect of the depositor.

Murphy v. Metropolitan National Bank, 191 Mass. 159.

But in McNeely v. Bank of North America, 221 Pa. 588, irrespective of the showing of damage to the bank, a failure of prompt notification after discovery of the forgery relieves the bank from liability.

In Connors v. Old Forge Bank (Pa.), 91 Atl. 210, it was held a delay of forty-three days after knowledge of forgery before notifying the bank was sufficient to deprive him of the right of recovery.

Primarily a bank may pay and charge to its depositors only such sums as are duly authorized by the latter, and of course a forged check is not authority for such payment. It is, however, permitted to a bank to escape liability for repayment of amounts paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payments and that it has been free from any negligence. Morgan v. U. S. Mortgage & Trust Co., 208 N. Y. 218, 222, 101 N. E. 871, 872, L. R. A. 1915D, 741 Ann. Cas. 1914D, 462.

"If the depositor has by his negligence * * * caused loss to his bank, * * * he should be responsible for the damage caused by his

default, but *beyond this his liability should not extend.*" Critten v. Chemical Bank, 171 N. Y. 219, 228, 63 N. E. 969, 972 (57 L. R. A. 529). The depositor's liability "is limited to the damages sustained by the bank in consequence of such neglect." 171 N. Y. 229, 63 N. E. 973, 57 L. R. A. 529.

See also, Bank of Danvers v. Bank of Salem, 151 Mass. 280; Bank of St. Albans v. Farmers & Mechanics Bank, 10 Vt. 141; Bank v. Wood, 85 Me. 204; Carroll v. Safe Co., 111 Md. 252; Carmine v. Bowen, 104 Md. 198; Harris v. American Building Assn., 122 Ala. 545; Chester v. Wabash R. R., 182 Ill. 382; Belding Mfg. Co. v. Drury, 111 Mich. 41; Ackerman v. True, 175 N. Y. 353; Collier v. Miller, 137 N. Y. 332; Paul v. Kunz, 188 Pa. St. 504; Flint v. Babbett, 59 Vt. 190; Prieme v. Wis. Land Co., 103 Wis. 537; Greey v. Dockendorf, 231 U. S. 513; Coal Co. v. Trust Co., 197 Fed. 347; Dickerson v. Colgrove, 100 U. S. 580; Leather Manufacturers' Bank v. Morgan, 117 U. S. 96.

Subsequent wrongful dealing with negotiable paper by an agent who had authority to indorse his principal's name to it does not constitute the previous signature a forgery under this section.

Salem v. Bank of N. Y., 110 App. Div. N. Y. 636.

ARTICLE 4**Consideration**

Section 50. Presumption of consideration.

51. What contributes consideration.

52. What constitutes holder for value.

53. When lien on instrument constitutes holder for value.

54. Effect of want of consideration.

55. Liability of accommodation party.

§ 50. Presumption of consideration. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Negotiable notes and bills of exchange are presumed to have been made for a valid and adequate consideration, and whether they purport to have been given for value received or not, it is unnecessary for the plaintiff in the first instance to allege or prove a consideration. In this respect they differ from other contracts.

Foster v. Valentine, 48 Hun. 475.

An instrument "Due Kimball \$325 on demand," is a promissory note within the statute. Neither the acknowledgment of value received or negotiable words are essential.

Kimball v. Huntington, 10 Wend. 675; *Carver v. Hayes*, 67 Maine 257; *Franklin v. Marsh*, 6 N. H. 364.

But in *Deyo v. Thompson*, 53 App. Div. (N. Y.) 9, a note "On demand I promise to pay Helen Deyo three hundred dollars," does not import a consideration, and the burden is upon a party suing on such a note to prove the existence of a consideration by extrinsic evidence.

The recital for "value received" in the body of a note constitutes an admission that it was issued for a consideration.

Owen v. Blackburn, 161 App. Div. (N. Y.) 829; *Durland v. Durland*, 153 N. Y. 67; *Cartwright v. Gray*, 127 N. Y. 92; *First National Bank v. Stallo*, 160 App. Div. (N. Y.) 702.

But the omission of the words does not in any way affect the paper or overcome the presumption that it was given for value.

McLeod v. Hunter, 29 Misc. (N. Y.) 559; Faymouss Shoe Co. v. Crosswhite, 124 Mo. 34.

Where a complaint in an action upon a promissory note alleges the making of the note by the defendant, it is unnecessary to allege delivery or consideration, for both are presumed from the issuance of the instrument.

Abrahamson v. Steele, 176 App. Div. 865; First National Bank v. Stallo, 160 App. Div. 702.

An acceptance of a bill cannot as against a bonafide holder for value, defend on the ground that the acceptance was without consideration.

National Park Bank v. Saitta, 127 App. Div. (N. N.) 624, affirmed 196 N. Y. 548.

The maintenance of the presumption that a promissory note was given or indorsed for a sufficient consideration justifies the maxim "that when one by his carelessness and undue confidence has enabled another to obtain the money of an innocent third person, he must answer for the loss he has caused."

Lassas v. McCarty, 47 Or. 483; Bedell v. Herring, 77 Cal. 572.

A written promise by a stranger in the form of a note given to a husband in order that he might deliver the same to his wife, to whom it was made payable, in order to secure peace between a newly married couple, is without consideration, and the wife cannot recover the amount from the maker thereof, and neither the possession of the note nor the use of the words "value received" create any question of fact for the jury in an action brought upon it.

Kramer v. Kramer, 181 N. Y. 477; Strickland v. Henry, 175 N. Y. 373.

The negotiation of a promissory note in violation of the agreement under which it was given is a breach of faith and fraud upon the maker, and, when sued thereon, he is entitled to show the facts, before he can be called upon to prove that the plaintiff, an assignee of the note, was not a holder for value.

Ginsberg v. Thurman, 71 Misc. 463; German Am. Bank v. Cunningham, 97 App. Div. (N. Y.) 244 and cases cited.

One cannot make his own note the subject of a gift. Such a note is but the promise of the donor to pay money in the future. The gift is not completed until the money is paid. There is no delivery of the gift but the mere promise to deliver it in the future.

Sullivan v. Sullivan, 92 S. W. (Ky.) 966; Shugart v. Shugart, 76 S. W. (Tenn.) 821; Beatty v. Western College, 177 Ill. 280; School v. Sheidley, 138 Mo. 672; Richardson v. Richardson, 148 Ill. 563.

Consideration generally, *Hickok v. Bunting*, 92 App. Div. (N. Y.) 167; *First National Bank v. Stallo*, 160 App. Div. (N. Y.) 704; *Zimbleman v. Finnegan*, 118 N. W. 312; *Hawkins v. Windhorst* (Kas.) 108 Pac. 805; *Waxberg v. Stappler*, 83 Misc. 78; *National Discount Co. v. Jenkins*, 143 Supp. 996.

Burden of Proof.—The plaintiffs in an action upon a promissory note, to which the defense of want of consideration has been imposed, are entitled to rest after reading the note in evidence, as that raises a presumption that the note is a valid obligation based upon a good and legal consideration, and imposes upon the defendant the burden of showing a want of consideration. If the defendant offers any evidence showing or tending to show a want of consideration, it is incumbent upon the plaintiff to show the existence of a sufficient consideration by a preponderance of evidence.

Bringman v. Von Glahn, 71 App. Div. (N. Y.) 537; *Lombard v. Bryne*, 196 Mass. 236; *Perley v. Perley*, 144 Mass. 104; *Simpson v. Davis*, 119 Mass. 269; *Durland v. Durland*, 153 N. Y. 67; *Carnwright v. Gray*, 127 N. Y. 92; *Hartford National Bank v. Gardner*, 157 N. Y. Supp. 850; *Harding v. U. S. Zinc Co.*, 157 N. Y. Supp. 852; *Hague v. Northern Hotel Co.*, 77 Misc. 142; *Dan. Neg. Inst.*, Sec. 164.

If no evidence is introduced by the defendant showing a want of consideration, the plaintiff is entitled to recover; but this presumption being rebutted, the burden is upon the plaintiff to show by a preponderance of evidence that there was a consideration.

Bourne v. Ward, 62 Me. 155; 16 Am. Rep. 410; *Bank v. Seymour*, 64 Mich. 59; *Foote v. Valentine*, 48 Hun. 475.

In a contest between the payee of a bill of exchange and the drawer thereof, or a creditor of the drawer, over the proceeds of the draft, the payee by the terms of the Negotiable Instrument Law is presumed *prima facie* to be a holder for value, and the burden is on the party denying it to prove the contrary.

Lynchburg Co. v. National Exchange Bank, 109 Va. 639; See also, *Lombard v. Bryne*, 194 Mass. 288; *Carter v. Butler*, 264 Mo. 330; *Bank of Monticello v. Dooley*, 113 Wis. 590.

In an action by the payee against the maker of a note containing on its face the words "value received," a motion by the defendant without putting in any evidence to dismiss the complaint on the ground of failure of plaintiff to prove a consideration, should be denied since the burden of proving the want of consideration rests on the defendant.

Gerli v. Doorley, 151 N. Y. Supp. 574.

§ 51. **What constitutes consideration.** Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

That an antecedent debt may constitute a good consideration, see:

Boston Steel Co. v. Steuer, 183 Mass. 140; Evans v. Speer, 65 Ark. 204; Voss v. Chamberlain, 139 Ia. 569; Mack v. Prang, 104 Wis. 1.

An old debt and the extension of time for the payment thereof constitute "value."

In re Progressive Wall Paper Co., 224 Fed. 143.

This and the preceding section being applicable only to negotiable instruments as defined by Sec. 20, viz.—instruments for the payment of money are not applicable to a certificate of stock.

Cowles v. Kiehl, 65 N. Y. Supp. 349; American Press Assn. v. Brautingham, 75 App. Div. (N. Y.) 435.

The delivery of the old note was a sufficient consideration for the giving of the new one, and the defense of the failure of consideration of the first note cannot be brought against the second.

Smith v. Smith, 35 Pac. (Id.) 697; Fidelity Bank v. Miller, 162 Pac. 245.

But in Seager v. Drayton, 218 Mass. 571 is held, that if at the maturity of a note, which was made without consideration, the maker gives a new note, the new note is also without consideration, and no action can be maintained against the maker.

In order that a pre-existing debt may be a sufficient consideration for the accommodation indorsement of a note, the holder must show that he parted with something, that he has given up the original debt or the right to sue on it.

Rogonski v. Brill, 131 N. Y. Supp. 589.

The enactment of the section has not changed the rule that to constitute a holder for value of accommodation paper received for an antecedent debt, it must be taken in payment and discharge thereof.

Sutherland v. Mead, 80 App. Div. (N. Y.) 103.

If the consideration of the note, without any fault of the defendant, failed this was a matter of defense which should have been pleaded, for it cannot be inferred that the privilege was not worth all the defendant promised to pay for it or that the plaintiff was unable to confer it.

Equitable Trust Co. v. Newman, 69 Misc. 498; Frank v. Wessils, 64 N. Y. 155.

When the consideration for a promissory note was the promise of the payee to do certain work, the fact that the payee fails to keep his promise makes him liable for damages, but does not constitute a failure of consideration, which may be urged as a defense in a suit on the note.

Schiavone v. Lingarelli, 191 Ill. App. 167.

Mr. Justice Werner of the Supreme Court, later Associate Justice of the Court of Appeals of New York, in discussion of this question in Brewster v. Schrader, 26 Misc. 482, said; "The language of this section when given its usual and ordinary signification, ought to leave no doubt upon the subject. There is, however, a universal disposition among lawyers to look for some hidden or subtle meaning in the most simple language. If the language in this section were not obviously clear and unequivocal, and there were need of ascertaining the legislative intent, the history of the subject, the judicial decisions of England and states of this country, leave no possible doubt as to the purpose of the section."

The courts of England and our federal courts have held that a *bona fide* holder of a negotiable instrument who takes the same in payment of or as security for an antecedent debt, is a holder for a valuable consideration, entitled to protection against all equities between antecedent parties. In Railroad Co. v. National Bank, 102 U. S. 26, Mr. Justice Harden in an exhaustive opinion squarely adopted the rule that the taking of a note in payment of, or as security for, a pre-existing debt constitutes the holder thereof a holder for value in the usual course of business.

Supporting the above, see Mayer v. Heidelberg, 123 N. Y. 332.

See also, Sutherland v. Meade, 80 App. Div. (N. Y.) 103; Roseman v. Mahoney, 86 App. Div. (N. Y.) 377; Bank of America, 103 App. Div. (N. Y.) 33; Milius v. Kauffman, 104 App. Div. (N. Y.) 216; Grocers Bank v. Penfield, 60 N. Y. 502; M'Bee v. Shoemaker, 160 N. Y. Supp. 254.

A promissory note given for the purpose of making a gift or donation to the payee, if based upon no other consideration, cannot be enforced by the payee against the maker or his estate. The note is only an executory obligation, a promise to give, but not an extended gift until the note is actually paid.

Abelman v. Haehnel, 57 Ind. App. 15.

A valuable consideration is necessary to support any contract, and the rule makes no exceptions as to the character of the consideration respecting negotiable instruments when the consideration is open to inquiry. Therefore, a consideration founded on mere love and affection, or gratitude, is not sufficient to sustain a suit on a bill or note, as, for instance, when a bill

or note is accepted or made by a parent in favor of a child could not be enforced between the original parties.

Dan'l Neg. Inst., Sec. 179; 6 Am. & Eng. Ency. of Law, 679; Maynard v. Maynard, 105 Me. 570; Sullivan v. Sullivan, 92 S. W. (Ky.) 966.

§ 52. What constitutes holder for value. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Variant.—The Illinois statute substitutes for the second sentence, "An antecedent or pre-existing claim, whether for money or not, constitutes value where an instrument is taken either in satisfaction thereof or as security therefor, and is deemed such, whether the instrument is payable on demand or at a future time." The Wisconsin statute adds the words: "discharged, extinguished or extended" after the words "pre-existing debt."

The courts of New York at first refused to recognize in the application of this section the legislative intent to change the rule that had been followed in 1822, and followed in *Coddington v. Bay*, 20 Johns 637. See *Sutherland v. Mead*, 80 App. Div. 103, 107; *Roseman v. Mahoney*, 86 Id. 28, affirmed in 187 N. Y. 115. But the later cases, without expressly overruling these decisions, have held that the Negotiable Instruments Law has changed the rule, and held that a pre-existing debt without extension or forbearance is a sufficient consideration to constitute a holder for value.

King v. Bowling Green Trust Co., 145 App. Div. 398; *Maurice v. Fowler*, 78 Misc. 357; *Hall Co. v. Todd*, 139 Supp. 111.

One to whom a promissory note was indorsed and delivered before maturity in payment of a pre-existing debt is a holder for value, and in an action against the maker the equities between him and the payee are not available as a defense.

Broderick v. Bascomb Rope Co., 81 Misc. 199.

Upon exchange of promissory notes, each note is a valid consideration for the other and is fully available in the hands of its holder.

Rice v. Grange, 131 N. Y. 149; *Nickerson v. Ruger*, 84 N. Y. 675; *State Bank, etc. v. Smith*, 155 N. Y. 185; *Milius v. Kaufmann*, 104 App. Div. (N. Y.) 444.

The presumption that the indorsee of a negotiable note is a *bona fide* holder for value is not repelled merely by proof that the paper, as between the immediate parties, was without consideration.

Joveshof v. Rockey, 109 N. Y. Supp. 818, 58 Misc. 559.

Where a depositor in a bank, having sufficient funds standing to his credit, tenders to the bank a check in payment for negotiable paper it has for sale, and the bank accepts the check, charges it against the deposit and delivers the papers purchased, the purchaser is a holder for value, and the antecedent debt of the bank being *pro tanto* actually and in fact extinguished.

Mayer v. Heidelberg, 123 N. Y. 332.

A valuable consideration sufficient to support a contract may consist of some right, interest or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Union Bank v. Sullivan, 214 N. Y. 332.

Although a bank does not become a holder for value by merely placing the proceeds of the discount of a note to the credit of the payee, yet when it holds a note of the payee due on that day and pays the same by the application of the discount, it becomes a holder for value.

Van Norden Trust Co. v. Rosenberg, 123 App. Div. (N. Y.) 727.

Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon the books for the proceeds of said paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues the bank is held subject to the equities of the prior parties, even though the paper had been taken before maturity and without notice.

Bank v. Valentine, 18 Hun. 417; Bank v. Newell, 71 Wis. 309; Bank v. Huver, 114 Pa. 216; Dresser v. Missouri Co., 93 U. S. 227; Dreilling v. Bank, 43 Kan. 197; McNight v. Parsons, 136 Ia. 390; Security Bank v. Pretuschke, 101 Minn. 478; Grocery Co. v. Bank, 48 S. (Ala.) 340.

In order to constitute one the holder of a negotiable instrument for value it is not necessary that he part with present consideration.

King v. Bowling Green Trust Co., 145 App. Div. (N. Y.) 399.

The uniform interpretation of the section has been to continue and confirm the rule of the common law that a payee might claim the protection accorded any other bona fide holder for value.

Boston Iron & Steel Co. v. Steuer, 183 Mass. 140; Merseck v. Alderman, 77 Conn. 634; South Boston Iron Co. v. Brown, 63 Me. 139; Campbell v. Fourth National Bank, 137 Ky. 555; American Exch. Bank v. Armstrong, 133 U. S. 443.

Possession of a negotiable note properly indorsed is prima facie evidence that the holder is a bona fide purchaser.

Manhattan Sav. Inst. v. N. Y. National Bank, 107 N. Y. 58; Clark v. Skeen, 61 Kan. 526.

And if the defendant admits the execution of the note in suit, but denies that the holder is the owner thereof by purchase before maturity, and alleges want of consideration, the burden of proving such allegations is on the defendant.

Yates v. Spofford, 7 Idaho 737, 97 Am. St. Rep. 267.

§ 53. When lien on instrument constitutes holder for value. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

The pledgee has the right to enforce the collection of a collateral even though the principal debt is not yet due.

Seely v. Wiestrom, 49 Neb. 730; Elk Coal Co. v. Third National Bank, 157 Ky. 619; Field v. Sibley, 74 App. Div. (N. Y.) 81.

Recovery can be had only to the extent of the debt for which the paper is held as collateral security.

Brown v. Calloway, 41 Ark. 418; Fisher v. Ames, 98 Mass. 303; Union Bank v. Roberts, 45 Wis. 373.

Unless an accommodation note is shown to have been appropriated by the payee to some purpose other than for which it was given, the maker cannot set up the want of consideration in an action by one who has acquired the note in good faith, in the ordinary course of business for value, although after maturity.

Mersick v. Alderman, 77 Conn. 634; Dunn v. Weston, 71 Me. 270; Miller v. Larned, 103 Ill. 562; Maitland v. Citizens' Bank, 40 Md. 540.

If a negotiable promissory note, which is without consideration as between the original parties thereto, is delivered without consideration to another person, who pledges it before its maturity, as collateral security for a debt of his own of less amount than the face of the note, the pledgee, if they take it without notice, are to be deemed holders for value, and may maintain an action thereon for the amount due to them upon the debt which it was pledged to secure.

Fisher v. Fisher, 98 Mass. 303; Miller v. Pollock, 99 Pa. St. 202.

Where there is no other person entitled to receive the surplus, the pledgee can recover only the amount of the debt secured.

Stoddard v. Kimball, 60 Mass. 469.

In an action on a promissory note held as collateral security, the holder is entitled to judgment for the whole amount due on it with liability to account for the surplus to the owner of the note.

Camden Bank v. Fries, 214 Pa. St. 395.

Payment in amount beyond that for which it was pledged nor for a debt for which it was not pledged cannot be had against an accommodation maker.

C. N. Bank v. Bell, 125 N. Y. 42.

§ 54. Effect of want of consideration. Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise.

As between the original parties to a promissory note and others having notice, a conditional delivery, as well as want of consideration, may be shown; and parol evidence that the delivery was conditional and of the terms of the condition is not open to the objection of varying or contradicting the written contract.

Higgins v. Ridgway, 153 N. Y. 130; Benton v. Martin, 52 N. Y. 570; Bookstaver v. Jayne, 60 N. Y. 146; Breneman v. Furniss, 90 Pa. St. 186.

A consideration moving from one of several joint makers of a promissory note is good as to all.

First National Bank v. Hopper, 89 Neb. 377.

Where there was a good consideration for a draft when it was accepted, but subsequently such consideration entirely failed, held that the failure of consideration was a good defense to any action upon the paper brought by the transferee.

Leslie v. Bassett, 129 N. Y. 523; Ferguson v. Netter, 41 App. Div. (N. Y.) 274; reversed 204 N. Y. 505.

Upon an exchange of promissory notes, each note is a valid consideration for the other and constitutes a good consideration as an exchange of property.

Cobb v. Titus, 10 N. Y. 198; Rice v. Grange, 131 N. Y. 149; Newman v. Frost, 52 N. Y. 422; Williams v. Banks, 11 Md. 198.

Although a note itself is prima facie evidence of a consideration, the question is always open as between the immediate parties; and it is competent for the defendant to show, by parol, that there was no sufficient consideration, or that the consideration has failed, or that the paper was given for accommodation merely.

Cowee v. Cornell, 75 N. Y. 91; Batterman v. Butcher, 95 App. Div. (N. Y.) 213; Anthony v. Valentine, 130 Mass. 119; Franz v. Schiro, 136 La. 842; Ingersoll v. Marten, 58 Md. 67; Piner v. Brittain, 165 N. C. 401; Gresham Bank v. Walch, 157 Pac. Rep. (Ore.) 534.

The law presumes that a note regular on its face is a valid obligation based upon a good and legal consideration, and the burden of showing that there was a want of consideration rests upon the defendant.

Durland v. Durland, 153 N. Y. 67; *Bringman v. VonGlahn*, 71 App. Div. (N. Y.) 537; *Janvey v. Loketz*, 122 App. Div. (N. Y.) 410; *Lynds v. Van Valkenberg*, 77 Kas. 24; *Piner v. Brittain*, 165 N. C. 401.

An acceptor of a bill cannot, as against a bona fide holder for value, defend on the ground that the acceptance was without consideration, or for accommodation.

National Park Bank v. Saitta, 127 App. Div. (N. Y.) 624.

The maker of a note who induces another to purchase it from the payee, assuring him that it was valid and will be paid, cannot set up the illegality of the consideration against the assignee, who had no notice thereof.

Holzbog v. Bokrow, 156 Ky. 161.

Partial failure of consideration is a defense to an action on a note, only to the extent of the injury sustained by such failure.

Black v. Ridgway, 131 Mass. 80; *Carter v. Butler*, 264 Mo. 307; *Finance Co. v. Schroder*, 74 W. Va. 68; *Cline v. Miller*, 8 Md. 274; *Davis v. Wait*, 12 Oregon 425.

Although a bank does not become a holder for value by merely placing the proceeds of the discount of a note to the credit of the payee, yet when it holds a note of the payee due on that day and pays the same by application of the discount, it becomes a holder for value.

Wallabout Bank v. Peyton, 123 App. Div. (N. Y.) 727.

An assignee of a draft after maturity and for a nominal consideration, is not a holder in due course within the meaning of this section.

Ferguson v. Netter, 141 App. Div. (N. Y.) 274.

§ 55. Liability of accommodation party. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Variant.—The Illinois statute omits the words “without receiving value therefor” in first sentence and at the end of the section adds, “and in case a transfer after maturity was intended by the accommodating party, notwithstanding such holder acquired title after maturity.”

The clause "without receiving value therefor" is misleading and the courts have interpreted to mean without receiving value for the bill itself and not without receiving consideration for lending his name. Thus A, who receives \$25 for signing his name and received no value for the instrument, is an accommodation party.

Morris County Brick Co. v. Austin (N. J.) 75 Atl. 550.

Liability of accommodation maker.—When a promissory note, made by the maker for the accommodation of the payee with the intent that the payee should raise the money thereon, is discounted by a bank for the benefit of the payee, with knowledge of its accommodation character, the action of the bank in extending, after the maturity of the note, the time of payment thereof, without the knowledge or consent of the accommodation maker, does not discharge the accommodation maker.

National Citizens Bank v. Toplitz, 81 App. Div. (N. Y.) 593; *English v. Schlesinger*, 55 Misc. 584.

Unless an accommodation note is shown to have been appropriated by the payee to some purpose other than for which it was given, the maker cannot set up the want of consideration in an action by one who has acquired the note in good faith, in the ordinary course of business and for value, although after maturity.

Mersick v. Alderman, 77 Conn. 635; *Benjamin v. Rogers*, 126 N. Y. 60.

The very purpose of the accommodation would be defeated if knowledge of the fact that the responsible party was acting as an accommodator were a good defense in an action by a party who parted with value relying upon the credit of the accommodating party.

English v. Schlesinger, 105 N. Y. Supp. 990; *Black v. Bank of Westminster*, 96 Md. 418; *Dunn v. Weston*, 71 Me. 270; *Miller v. Larned*, 103 Ill. 562-570; *Maitland v. Citizens' Bank*, 40 Md. 540; *Marling v. Jones*, 138 Wis. 83.

Where at the solicitation of the cashier of a bank and for the purpose of making good an overdraft by a customer of the bank, a third person without receiving any consideration delivers to the cashier, who knows of such lack of consideration, his check drawn upon a second bank, payable to his own order and indorsed by him to be deposited to the credit of the overdrawn account, the first bank is not a party accommodated and can recover from the drawer of the check.

Neal v. Wilson, 213 Mass. 336; *Jennings v. Wall*, 217 Mass. 284.

No consideration moving to the accommodation maker is necessary to uphold an accommodation note, the consideration supporting his promise being that parted with by the person taking the note and received by the person accommodated.

Marling v. Jones, 138 Wis. 82.

A transferee of negotiable paper who takes it knowing that it was executed by an accommodation maker, and transferred in violation of the conditions or limitations imposed by such maker, cannot maintain an action thereon against him.

Benjamin v. Rogers, 126 N. Y. 60; *U. S. N. Bank v. Ewing*, 131 N. Y. 506.

A wife is not an accommodation maker of a promissory note where the note is given in payment of a transaction in which she has a property or pecuniary interest, such for instance as the payment for labor and materials in the construction of a house by the husband on land owned by the wife.

Brayer v. Edell, 163 N. Y. Supp. 989.

Liability of accommodation indorser.—An accommodation indorser of a raised check was liable to a bank paying the same for the difference between the amount of the check as originally drawn, and the amount to which it was raised.

Cooley v. Curran, 104 N. Y. Supp. 751; *Smith v. State Bank*, 54 Misc. 550.

If the note be raised by the maker, without the knowledge of the accommodation indorser, subsequent to such indorsement, the accommodation indorser is only liable for the amount of the note as indorsed by him.

Packard v. Windholz, 88 App. Div. (N. Y.) 365; *Smith v. State Bank*, 54 Misc. 550.

A person who indorses a note for the accommodation of the maker, without knowledge that the note is to be used for the benefit of the maker, is not relieved from liability to a person to whom the maker negotiates it for value, simply because the latter knew the accommodation nature of the indorsement.

Packard v. Windholz, 88 App. Div. (N. Y.) 365.

This section was not intended to prevent the courts from determining in equity all questions between an insolvent holder of a note and one primarily liable for the indebtedness on the instrument as a matter of fact, whether maker or indorser.

Building, etc., Co. v. Northern Bank, 206 N. Y. 400; *U. S. N. Bank v. Ewing*, 131 N. Y. 506.

One who indorses a promissory note without consideration for the accommodation of the maker, becomes simply a surety.

Easton Mfg. Co. v. Caminez, 146 App. Div. (N. Y.) 436; *Maurice v. Fowler*, 78 Misc. 357.

The payee's extension of time on a note does not release the accommodation indorsers on a collateral note.

Commercial National Bank v. Sanders (La.) 71 S. Rep. 891.

The fact that the indorsee for value of a promissory note knew that it was an accommodation note between the original parties, is not a defense to an action by him on the note.

Black v. Bank of Westminster, 96 Md. 399; Cotrell v. Watkins, 89 Va. 816; National Bank of Newport v. Snyder, 117 App. Div. (N. Y.) 37.

Partner as accommodation party.—Where the signature of the firm is designated as that of a surety, or when there is anything in the appearance of the note to charge the holder with knowledge that the signature is used by the way of accommodation, the holder cannot recover without showing the assent of all the partners; for it is not within the usual scope of partnership business to assume a liability for the debt of another.

Clement Bank v. Connolly, 88 Vt. 57; 1 Dan. Neg. Inst. Sec. 365; National Bank, etc. v. Law, 127 Mass. 72; Bank of Commerce v. Selden, 3 Minn. 155; Sherwood v. Snow, 46 Iowa 481; 26 Am. Rep. 155; Vosburg v. Diefendorf, 119 N. Y. 357; Smith v. Weston, 159 N. Y. 194; Tanner v. Hall, 1 Pa. St. 417; Atlas v. Savery, 127 Mass. 75.

The law as to the liability on partnership, the subject is well stated in Stall v. Catskill Bank, 18 Wend. 466, where the court stated, "It is no part of the ordinary business of a mercantile firm to make or indorse notes as sureties for third persons, or to pay the private debts of the individual partners, and of course there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership has no interest, for such purposes. If, therefore, it appears upon the face of the paper, that the partnership name is signed as a mere surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of business. He must, therefore, at his peril, make the necessary inquiries, and ascertain that there was some special authority for one partner to sign the partnership name as such surety, either expressed or implied. So if the drawer of a note carries it to the bank to get it discounted on his own account, or transfers it to a third person with the firm name indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would be in the hands of the drawer; and the bank or the person who receives it from the drawer, being thus chargeable with notice that the firm is a mere surety of the drawer and the members of the firm who have been made sureties without their consent, are not liable to such holders of the note."

Partnership accommodation paper.

\$ 2000	Boston Mass. May 3 1900
Three	after date we promise to pay to
the order of J. K. Van Campen	
Two thousand no fee	Dollars
at First Nat Bank	
Value received	
Mr. J. K. Van Campen	Weston Bros.

(INDORSED)

J. K. VAN CAMPEN
WESTON BROS.

In the above case Weston Bros. indorsed for accommodation of the makers without consideration or without authority. The plaintiff in taking the note knew he was dealing with one of the makers of the note when he took it from the payee, and he also knew Mr. Van Campen, either as maker or first indorser, could not be expected to have possession of the note if it had passed through the firm of Weston Bros. in the ordinary course of business. He was therefore put upon inquiry, which, if made in the proper quarters, would have disclosed the fact that the second indorsement was made without authority.

Corporation accommodation paper.—A banking corporation may become the indorser of and procure paper owned by it to be discounted for the use and benefit of the banking corporation, but it is not authorized to make an accommodation indorsement.

Bank of Genesee v. Patchin Bank, 13 N. Y. 309.

When an individual signs a note as an accommodation maker or indorser for the benefit of another, he is liable to a subsequent holder for value, although the holder knew him to be an accommodation party. But the rule does not hold in the case of a manufacturing corporation which has no power to bind itself as an accommodation party.

<u>Pay to</u>	<u>Little's Falls, N.Y. Jan. 3, 1907</u>
<u>Three months</u>	<u>after date I promise to pay to</u>
<u>the order of Newport Knitting Co.</u>	
<u>Five thousand</u>	<u>Dollars</u>
<u>at Nat Bank of Newport</u>	
<u>Value received</u>	
<u>For</u>	<u>Homer P. Snyder</u>

(INDORSED)

**SNYDER MANUFACTURING CO.
NEWPORT KNITTING CO.**

The National Bank of Newport held the foregoing note which it received from the Newport Knitting Company, executed by Homer P. Snyder, who was a director in both corporations, the Newport Knitting Company and the Snyder Manufacturing Company; in fact, Snyder and two others composed the majority of directorate in each company. The Court, in an action commenced by the National Bank of Newport v. Snyder Mfg. Co. (117 App. Div. 373) held, that a manufacturing corporation has no power to bind itself as accommodation party.

Bank of Genesee v. Patchin Bank, 13 N. Y. 309; National Park Bank v. German Am. M. W. Co., 116 N. Y. 281; Fox v. Rural Home Co., 90 Hun. 365.

Notwithstanding the general rule a corporation is bound if it makes or indorses commercial paper for the accommodation of another in respect to a *bona fide* holder who discounts it before maturity on the faith of its being business paper.

Mechanics Bank v. White, 35 N. Y. 505.

The decision in the above cited case and other similar decisions are based upon the assumption that the officers making or indorsing a promissory note had authority from the corporation to make or indorse such notes in the ordinary course of business. Such decisions do not apply to a case where the officers purporting to act for a corporation do not have authority to sign commercial paper in the ordinary course of business. An officer of a corporation has no power to make promissory notes in its name unless such power is expressly given to such officer by the by-laws of the corporation or by resolution of its board of directors.

National Bank of Newport v. Snyder, 107 App. Div. (N. Y.) 95; Niagara Falls Co. v. Bachman, 66 N. Y. 261; Peoples Bank v. St. Anthony's

Church, 109 N. Y. 512; Newman v. Newman, 160 App. Div. (N. Y.) 331; Black v. Bank of Westminster, 96 Md. 400; Hall v. Auburn Turnpike Co., 27 Cal. 256.

It is essential for one claiming that another is equitably estopped from denying liability because of previous acts to show that he was influenced by and relied upon such acts in making the promise or performing the act upon which the liability is asserted.

Jacobus v. Jamestown, 211 N. Y. 154.

On proof that the indorsement was for the accommodation of the maker, the burden shifts to the plaintiff to show that he was a holder for value and became such without notice that the corporation was an accommodation indorser.

Jacobus v. Jamestown, 211 N. Y. 154, 159; National Park Bank v. German Am., etc., 116 N. Y. 281; Abbott v. LePrevost, 166 App. Div. (N. Y.) 43.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity and powers of its officers.

Davis v. Old Colony R. R., 131 Mass. 258; Cox v. North Brew. Co., 245 Pa. St. 418; Fox v. Rural Home, 90 Hun. 365.

An accommodation indorsement of a note by a corporation is *ultra vires* and cannot be enforced by one who takes the note with notice that the indorsement was without consideration.

Brill Co. v. Norton, etc., R. R., 189 Mass. 431; Carlaftes v. Goldmeyer Co., 72 Misc. 75.

Accommodation paper executed by agent.—A general power of an agent to make or indorse negotiable paper on behalf of his principal will not warrant the agent in putting the name of his principal to the paper for the accommodation of the agent or a third person, and in the absence of express authority the principal will not be bound by accommodation paper made in his name by an agent.

Allen v. First National Bank, 127 Pa. St. 51; Hall v. Auburn Turnpike Co., 27 Cal. 255; 87 Am. Dec. 75.

Married woman as accommodation party.—If a promissory note, although made in fact by a married woman, embodies a contract that she is disabled by law from making, it never becomes her promissory note.

The Peoples' Bank v. Schepflin, 73 N. J. L. 29.

If a married woman signs as accommodation indorser the note of a partnership of which her husband is a member and the business manager, payable to him and indorsed also by him, she is liable on her indorsement.

Middleborough Bank v. Cole, 191 Mass. 169.

A note executed by a woman to enable her husband to borrow money from an estate of which he is trustee, is not accommodation paper, since the purpose for which it may be used is restricted.

Burr v. Beckler, 264 Ill. 230.

Order of Liability.—Promissory notes made and indorsed and discounted by the payee under an agreement between them that the maker and indorser shall each receive one-half of the proceeds and pay one-half of the notes, are not accommodation paper.

Reyburn v. Queen City Bank, 171 Fed. Rep. 609.

Accommodation parties to commercial paper are liable to each other in succession as their names appear upon the instrument unless they specially agree that they are to be bound jointly and not severally, which fact may be proven by parol.

Noble v. Beeman, etc., 65 Or. 93; Bradley Engineering Co. v. Heyburn, 56 Wash. 629; Haddock v. Haddock, 118 App. Div. (N. Y.) 412; 192 N. Y. 510.

Parol evidence is necessary to determine whether a party to an instrument including an indorser thereon is an accommodation party, and also to determine which other party to the instrument he had accommodated.

Haddock v. Haddock, 192 N. Y. 510.

Parol evidence is admissible to show that a note was made for the accommodation of the payee.

Ryan v. Sullivan, 143 App. Div. 471.

ARTICLE 5**Negotiation**

Section 60. What constitutes negotiation.

61. Indorsement; how made.
62. Indorsement must be of entire instrument.
63. Kinds of indorsement.
64. Special indorsement; indorsement in blank.
65. Blank indorsement; how changed to special indorsement.
66. When indorsement restrictive.
67. Effect of restrictive indorsement; rights of indorsee.
68. Qualified indorsement.
69. Conditional indorsement.
70. Indorsement of instrument payable to bearer.
71. Indorsement where payable to two or more persons.
72. Effect of instrument drawn or indorsed to a person as cashier.
73. Indorsement where name is wrongly designated or misspelled.
74. Indorsement in representative capacity.
75. Time of indorsement; presumption.
76. Place of indorsement; presumption.
77. Continuation of negotiable character.
78. Striking out indorsement.
79. Transfer without indorsement; effect of.
80. When prior party may negotiate instrument.


§ 60. **What constitutes negotiation.** An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Meaning of Negotiation.—Negotiation means the act by which a bill of exchange or promissory note is put into circulation by being passed from one of the original parties to another person. If A gives B a check on C's bank and B presents the check at the counter of C, no negotiation is necessary or had, he simply demands and receives payment; but if B goes to D's store and buys a bill of goods and tenders the indorsed check in payment, he negotiates the check. When a check is presented to the bank upon which it was drawn, and is paid by such bank, such payment discharges the instrument and the bank is not thereafter, within the meaning of the statute, "a holder" of such check.

Aurora Bank v. Hayes, etc., 88 Neb. 190.

HOUSTON, TEXAS. Aug 3 1917 No. 2678

SOUTH TEXAS COMMERCIAL NATIONAL BANK

 PAY TO THE ORDER OF Wizard Electric Co \$ 2000

Two thousand DOLLARS

UNITED STATES DEPOSITARY Selden Birchard

(INDORSED)

PAY TO FIRST NATIONAL BANK, NEW YORK
WIZARD ELECTRIC CO.
by JAMES L. SAMPSON
FIRST NATIONAL BANK, BROOKLYN

The indorsement "Wizard Electric Company by James L. Sampson" does not indicate the character of the Wizard Electric Company as to whether it is a corporation or partnership. The indorsement is, therefore, irregular and it should be returned to the indorsers for guarantee. As regards the indorsement of the First National Bank, which is missing, the

same should be called to the attention of the bank presenting the same for guarantee, so that it may protect itself. Of course, the bank on which the paper is drawn may rely upon its rights of recourse against the First National Bank, which is the last indorser, without any guarantee, but the proper course would be to call to the attention of the last indorser the irregularity and give it an opportunity to take such measure for its protection as it may see fit.

Delivery.—To constitute a title to a promissory note by indorsement, a delivery of the note by the indorser to the indorsee, or that which is equivocal to such delivery, is necessary. One who indorses a note to an agent, merely for the purpose of enabling the latter to collect it for the former, may sustain a suit on it in his own name.

Dann v. Norris, 24 Conn. 333; Scotland Bank v. Hohn, 146 Mo. 699.

Mere indorsement of the name of the payee is ineffectual to pass the title to a note without actual delivery.

Spencer v. Carstarphen, 15 Colo. 445.

If a person who indorses a bill or note to another, whether for value or for the purpose of collection, comes again into possession thereof, he is to be regarded, unless the contrary appears, as the *bona fide* holder and owner of such bill or note, and is entitled to recover thereon without producing any receipt, or indorsement back to him, and he may strike the subsequent indorsements and his own from the bill or note, or not, as he may think proper.

Middleton v. Griffith, 57 N. J. L. 442.

Where the maker of a check required the payee named therein to indorse the instrument as payable to the order of the plaintiff and delivered the check thus indorsed to the payee with instructions to deliver the same to the plaintiff, there was a constructive, although no actual delivery to the plaintiff, so as to vest him with legal title.

Wolfen v. Security Bank of N. Y., 170 App. Div. (N. Y.) 519.

Parol evidence is inadmissible to establish an oral agreement contemporaneous with the making of a negotiable instrument, whereby said instrument was not to be negotiated.

Benton v. Sikyta, 84 Neb. 808; See also, Wooley v. Cobb, 165 Mass. 503; Wood v. Schaefer, 173 Mass. 443.

§ 61. Indorsement; how made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Variant.—The Illinois statute adds at the end of the section “and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated.”

An indorsement in pencil or by mark is sufficient. A person may become bound by any mark or designation he thinks proper to adopt, provided it is used as a substitute for his name, and he intends to bind himself. Thus where an indorsement was in lead pencil and in figures “1, 2, 8,” no name being written.

Brown v. Butchers' Bank, 6 Hill 443, 41 Am. Dec. 735; *Drefahl v. Security Savings Bank* (Ia.) 107 N. W. 179.

Where the name of the drawee is stamped on the back with a rubber stamp, by one having authority to do so, and with intent to indorse it, it is a valid indorsement, but does not prove itself and must be established by proper testimony.

Mayers v. McRimmon, 140 N. C. 642; *Homer v. Mo. Pa. R. Co.*, 70 Mo. App. 291; *Loughrer v. Bonniwell*, 125 Ia. 518; *Herrick v. Morrill*, 37 Minn. 250.

It has been many times held that affixing a rubber stamp to an instrument is sufficient in law to fulfill the requirement that the indorsement or the name must be written or in writing, if the stamp is affixed with the intent of using it as an indorsement. For illustration, see *Horner v. Missouri Pac. Ry. Co.*, 70 Mo. App. 285, 291. In that case our court said: “The word ‘writing,’ in law, not only means words traced with a pen or stamped, but printed or engraved or made legible by any other device,” citing *Henshaw v. Foster*, 9 Pick. (Mass.) 312.

10-21

**THE
FIDELITY TRUST COMPANY**

OF BUFFALO, N.Y. *May 24. 1917*

PAY TO THE ORDER OF *Dr. Thomas A. Killip* \$ *240.00*

Two hundred forty DOLLARS

No. *3819* *Leah Smith*

(INDORSED)

PAY TO
H. COHEN
THOS. A. KILLIP

PAY TO
WATSON B. KENDALL
H. COHEN
COMMERCIAL BANK

The indorsement "Thomas A. Killip" is correct, the title Dr. is not necessary, although the check should not be cashed on account of the missing indorsement of Watson B. Kendall.

An indorsement of "all the right, title and interest of the payee of a note" does not in any way affect its negotiability, and the indorsee is deemed *prima facie* to be a holder in due course, if he has possession of the note under such indorsement.

Evans v. Freeman, 142 N. C. 66; Patent Title Co. v. Stratton, 89 Fed. 174; First National Bank v. McCullough, 17 L. R. A. 1105; Borden v. Clark, 26 Mich. 61; Thorp v. Mindeman, 123 Wis. 140; Schmidt v. Pegg, 172 Mich. 163; Hailey v. Falconer, 32 Ala. 536.

"For value received I hereby guarantee payment of the within note and waive demand and notice of protest" written on the back of a note by the payee, constitutes a mere guaranty and not an indorsement in due course.

Ireland v. Floyds, 142 Pac. 401.

The words "I hereby assign this note over to E. H. Farnsworth this, the Nov. 1st, 1910," signed by the payee on the back of a negotiable promissory note, complete and regular on its face, accompanied by delivery is an indorsement of the note.

Farnsworth v. Burdick, 94 Kans. 749.

The assignee of a promissory note takes it subject to any defenses or counterclaim good as against the assignor, at least to the amount of the note.

Smith v. Hedges, 89 Misc. 183; Zabriskie v. C. V. R. R. Co., 131 N. Y. 72.

\$ 1000	Omaha Neb. Dec. 1 1906
Four months	after date I promise to pay to
the order of Samuel A. Case	
One thousand	Dollars
at First Nat. Bank	
Value received with interest	
Me	Samuel Markus

The assignment of the foregoing note without indorsement and on a separate paper is sufficient to constitute the holder a bona fide holder for value so as to cut off the defenses of the maker, and if he had a defense the holder could not enforce payment, the holder standing in the same position as his assignors and can assert only such rights as he might have.

Central Trust Co. v. First National Bank, 101 U. S. 58; Traders Bank v. Taylor, 100 Mass. 18.

This section applied as definition of holder in due course.

Manufacturers' Commercial Co. v. Blitz, 131 App. Div. (N. Y.) 17.

The formal requisites of an indorsement are:

(a) Though usually on the back of the instrument it is valid on its face, but it must be somewhere upon it. When by reason of rapid circulation the instrument becomes filled with indorsements, the law merchant permits the holder to paste on a slip of paper for his own and subsequent indorsements. This is called an allonge.

(b) Any form of words with the signature from which the intent of the holder to indorse may be determined a sufficient indorsement. The usual signature of the indorser is the common form of indorsement.

See Subd. 6, Sec. 36; Haines v. Dubois, 29 N. J. L. 259; Costello v. Crowell, 127 Mass. 293; Dinsmore v. Duncan, 57 N. Y. 573; Van Zandt v. Hopkins, 151 Ill. 573; Arnot v. Symonds, 85 Pa. St. 99.

LAUREL, MISS Sept. 3 1917

85-69 THE FIRST NATIONAL BANK 85-69
OF LAUREL

PAY TO THE ORDER OF Edward L. Stull, Secy. \$ 2500

Twenty five hundred ^{no 100} DOLLARS

Gemuth & Co.
J. W. Wilson, Treas.

(INDORSED)

PAY TO AMERICAN PIPE CO.
E. HOWE, TREAS.
AMERICAN PIPE COMPANY

The question in the above indorsement is as to whether Edward G. Stull and E. Howe are Secretary and Treasurer respectively of the American Pipe Company. If the paying bank has knowledge that they are both authorized officers of the same company, it may safely pay the check, although on its face the indorsements are irregular. In the absence of such knowledge the check should be returned for proper indorsement. The omission of the margin figures is immaterial.

The usual mode of transfer of a promissory note is by simply writing the indorser's name on the back, or by writing also over it the direction to pay the indorsee named, or order, or to him or bearer. An indorsement may, however, be made in more enlarged terms, and the indorser be held liable as such. In *Sands v. Wood*, 1 Iowa 263, the indorsement was, "I assign the within note to Mrs. Sarah Coffin." In *Sears v. Lautz*, 47 Iowa 658, the indorsement was, "I hereby assign all my right and title to Louis Meckley." In each case the party so assigning was held as indorser. The court in the latter case saying, "He used no words that in and for themselves indicated that he had bound or made himself liable in case the maker, after demand, failed to pay the note. But it was held the law as a legal conclusion, attached to the words used the liability that follows the indorsement of a promissory note."

See also, *Shelby v. Judd*, 24 Kan. 166; *Brotherton v. Street*, 124 Ind. 599; *Gale v. Mayhew*, 125 N. W. Rep. 781.

Where a note was indorsed "For value received I transfer to A all my right, title and interest in the within note, to be enjoyed in the same

manner as may have been by me," it was held, that such indorsement exempted the indorser from personal liability on the note.

Hailey v. Falconer, 32 Ala. 536; Aniba v. Yeomans, 39 Mich. 171; Fassin v. Hubbard, 55 N. Y. 465.

Indorsement by guaranty

\$600.00	St. Louis, Mo. Aug. 1. 1917
Three months after date I promise to pay to	
the order of William B. Smith	
Six hundred and no/100	Dollars
at Traders Nat. Bank	
Value received with use	
No.	John A. Swanson

(INDORSED)

WILLIAM B. SMITH

FOR VALUE RECEIVED I HEREBY GUARANTEE THE PAYMENT OF THE WITHIN NOTE TO ANY HOLDER THEREOF, TOGETHER WITH ANY COSTS AND EXPENSES INCURRED IN THE COLLECTION OF THE AMOUNT THEREOF FROM THE MAKER, INDORSEE, MYSELF OR EITHER OR ALL OF US.

JOHN DOE

A surety is not entitled to a notice of dishonor.

Manufacturing Co. v. Kimmel, 87 Ind. 566; Ballard v. Burton, 16 L. R. A. 667; Dan. Neg. Int. Sec. 1753; Coleman v. Fuller, 105 N. C. 328; Hall v. Weaver, 34 Fed. Rep. 104; Kitton v. Tool Co., 22 R. I. 611.

The words "For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due," written on the back of the note by the payee, do not constitute an indorsement and transfer in due course, but constitute a mere guarantee of payment. And the maker of such note is entitled to make the same defenses against same in the hands of the holder under such guaranty that he would be entitled to make if it were in the hands of the original payee.

Ireland v. Floyd, 42 Oakl. 609; Swenson v. Stoltz, 36 Was. 318; Hall v. Toby, 110 Pa. St. 318; Thorp v. Mindeman, 123 Wis. 150.

§ 62. Indorsement must be of entire instrument. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a

part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

Where an executor accepts a promissory note in payment for property belonging to testator and thereafter assigns one-fifth of such promissory note to each of the five beneficiaries of the estate and he, himself, retains possession of the note, each of the five beneficiaries is not entitled to maintain a separate action against the maker to recover the one-fifth part thereof assigned to him, as the obligation is single and cannot be divided into parts.

King v. King, 73 App. Div. (N. Y.) 547.

A complaint which alleges that defendant made a promissory note on a certain date, and that the payees thereafter and before maturity of said note indorsed a one-half interest therein and delivered the same to plaintiff, who is now the owner and holder thereof, fails to state a cause of action.

Barkley v. Muller, 164 App. Div. (N. Y.) 351.

A negotiable promissory note, dated July 8, and signed by fifteen persons, had indorsements on it of partial payments dated July 11, by the signers. The note was finally delivered on July 13. *Held*, the indorsements did not destroy the negotiability of the note, inasmuch as the amount due, although not expressly stated, could be ascertained with mathematical certainty.

Smith v. Shippey, 182 Pa. St. 24.

Notes cannot be apportioned by assignment. Were the law otherwise, the holder of a promissory note might greatly oppress the payee by making numerous assignments of parts of the note, and thus multiply suits, if the same were not paid at maturity.

Lindsay v. Price, 33 Texas 282.

§ 63. Kinds of indorsement. An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

An indorsement in blank means that the instrument is to be paid to the person who may hold it. These may be successive indorsements in blank.

The indorsee in blank, or any subsequent bona fide holder, may write over an indorsement in blank any contract consistent with the character of the indorsement. Sec. 65.

There is no difference between a note indorsed in blank and one payable to bearer and is deemed to be treated as so much cash, unless the payee chooses by a specific indorsement to some person to restrain its currency.

\$ 425.00	Rochester, N.Y. June 3 1917
Six months	after date I promise to pay to
the order of Henry C. Brewster	
Four hundred twenty five	Dollars
at Security Bank	
Value received with interest	
Mr. _____	Thos. Johnston

This note payable to order is the sole property of Brewster until indorsed by him. If it is lost or stolen and paid by the maker without Brewster's indorsement, the maker will continue to be liable for the amount. When Brewster indorses his name on the back

(INDORSEMENT IN BLANK)

HENRY C. BREWSTER

the note would then be indorsed in blank and is then payable to bearer and should it be negotiated further, Brewster would be liable to such subsequent holder if the note was duly protested for non-payment and Brewster received notice thereof. The note being payable to "order" Brewster could negotiate the note away. If Brewster should indorse

PAY TO PETER VAY OR ORDER

HENRY C. BREWSTER

would mean an indorsement in full and could not again be further negotiated without the signature of Vay. Should Vay indorse

(QUALIFIED INDORSEMENT)

WITHOUT RECOURSE

PETER VAY

such indorsement does not impair the negotiable character of the bill.

(CONDITIONAL INDORSEMENT)

Pay James L. Hotchkiss or order on the completion of the Le Roy branch B. R. & P. R. R.

JOHN F. DINKEY

The maker of the note can pay if he choose, whether the condition has been fulfilled or not.

(RESTRICTIVE INDORSEMENT)

Pay Fred Zoller or order for collection for my account

C. C. DAVY

The last two indorsements destroy the further negotiation of the note as a negotiable instrument.

§ 64. **Special indorsement; indorsement in blank.** A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

Variant.—The Massachusetts statute substitutes the words “does not specify any indorsee” for “specifies no indorsee.” The Wyoming statute adds the word “made” between “be” and “payable,” second line.

The legal effect of a blank indorsement on a promissory note cannot be varied by parol evidence.

Torbert v. Montague, 38 Colo. 325; See, Zimmer v. Cheu, 34 App. Div. (N. Y.) 505.

Where notes are indorsed in blank to an agent, for a particular purpose, which has been disregarded by him, the principal will be bound to a *bona fide* holder by reason of the general authority implied in the blank, and cannot against such holder, avail himself of the fact that the agent exceeded his authority.

Wedge Co. v. Denver Bank, 19 Cola. App. 188.

The indorsement of a note in blank by the payee and its production by the plaintiff in an action thereon are *prima facie* evidence of the latter's ownership of it and the existence of subsequent indorsements, does not effect the presumption, especially where they were cancelled.

Zimmer v. Cheu, 34 App. Div. (N. Y.) 505; 4 Am. & Eng. Ency. of Law (2nd ed.) 318 and cases cited.

A check upon its face is made payable to F. M. Rounds and is indorsed by Rounds in these words, “Pay to the order of _____ with his signature written immediately below.” This amounts to an indorsement in blank, rendering the instrument payable to bearer and negotiable by delivery.

State v. Hinton, 109 Pac. 26.

Where A, the holder of a check, indorsed it in blank, and delivered it to B for deposit to A's account, the drawee bank was protected in paying the check in good faith to B. *Peerot v. Mt. Morris Bank*, 120 N. Y. App. Div. 241, 104 N. Y. Supp. 1045.

Where one indorses a note in blank, he warrants to all subsequent holders in due course that he will pay the note to the holder on receiving due notice that the maker, upon demand at the proper time, neglected to pay it, and if the maker has become the holder also, he cannot by presentment and notice of refusal recover on the indorsement.

Abramonitz v. Abramowitz, 113 N. Y. Supp. 798.

§ 65. Blank indorsement; how changed to special indorsement. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

The holder of a note indorsed in blank by the payee has no right to change the contract of the indorser by writing over the name of the indorser a contract of guaranty without the knowledge or consent of the indorser.

Belden v. Hann, 61 Iowa 44.

In an action on a note indorsed in blank and negotiated by delivery, it was no defense that it was not indorsed by the party from whom plaintiff purchased it.

Dominion Trust Co. v. Hildner, 243 Pa. 253, 90 Atl. 69.

§ 66. When indorsement restrictive. An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Examples of restrictive indorsement. "Pay to A only," "Pay to A for my use," "The within must be credited to A," "Credit my account," "For collection and return."

Subd. 1.—A note indorsed "Pay the within to A. Thatcher" with the omission of the words "or order" does not restrict further negotiation.

Leavitt v. Putnam, 3 N. Y. 496.

In *Edie v. East India Co.*, 2 Burr 1221, the examples of restrictive indorsements put by the way of example are, "Pay to my steward and no other person for my use." This shows there was no intention to pass title; and the same effect has been given to an indorsement, "Pay to P only." It was held that these words indicated that the indorsee was agent only.

Power v. Finnie, 4 Call. (Va.) 411; "Pay S or order for account Merchants' National Bank;" *White v. Miners' National Bank*, 102 U. S. 658.

Subd. 2.—The general trend of decisions hold that an indorsement for collection or deposit constitutes a retention of title in the absence of any agreement to the contrary, and the owner may control such paper unless paid.

Freemans' Bank v. National Tube Co., 151 Mass. 413; 21 Am. St. Rep. 461.

An indorsement in blank accompanied by a letter stating that the inclosed draft was for "collection and credit" must be read together, and the effect is to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement.

Bank of America v. Waydell, 187 N. Y. 120.

Plaintiffs were owners of certain sight drafts drawn on the defendants by P, who was plaintiff's confidential clerk and had authority to receive payment for them in the course of their business, indorsed them "For deposit in Broadway National Bank." A messenger boy in plaintiff's employ, who had been directed by them to obey the orders of P, by his directions took the drafts to defendant's office and received payment in money, which he paid over to P, who misappropriated it. In an action for alleged conversion *held*, that the indorsement did not confer apparent authority upon the boy to receive payment, but as P had such authority, the delivery of the money to him was a valid payment to plaintiff.

Johnson v. Donnell, 90 N. Y. 1.

An indorsement for collection is not a transfer of the title to the indorsee, but merely constitutes him the agent of the indorser to present the paper, demand and receive payment and remit the proceeds.

National Butchers, etc., Bank v. Hubbell, 117 N. Y. 384.

When a bank to which a draft, appearing on its face to be negotiable, is forwarded by another bank, purchases it for value, without notice of the agreement restricting negotiation, the drawer may not stop payment of the draft against the rights of the bank so holding the paper.

Bank v. Oil Mills, 150 N. C. 719.

Indorsement for collection and deposit, see, *N. W. National Bank v. Bank of Commerce*, 107 Mo. 402; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Blaine v. Bourne*, 11 R. I. 119; *Armstrong v. National Bank*, 90 Ky. 431; *Ditch v. Western National Bank*, 79 Md. 192; *Smith v. Bayer*, 46 Or. 143; *Commercial National Bank v. Armstrong*, 148 U. S. 50; *Beal v. Somerville*, 50 Fed. 647; *Haskell v. Avery*, 181 Mass. 106.

Subd. 3.—Restrictive indorsements are held to negative the presumption of a consideration, on such as indicate that they are not intended to pass title, but merely to enable the indorsee to collect for the benefit of the indorser. An indorsement "Pay to the order of Mrs. Mary Hock for the benefit of her son Charlie," imparted consideration, and in effect was simply to give notice of the interest of the beneficiary named, and protect him against misappropriation.

Hock v. Pratt, 78 N. Y. 375.

§ 67. Effect of restrictive indorsement; rights of indorsee. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorseees acquire only the title of the first indorsee under the restrictive indorsement.

Variant.—The Illinois statute adds to subdivision "or except in the case of a restrictive indorsement specified in Section 36—Sub-section 2—any action against the indorser or any prior party that a special indorsee would be entitled to bring," and eliminates the words "his rights as such indorsee" in Subdivision 3 and substitutes therefor "the instrument" and adds at the end of Subdivision 3 the clause "specified in Section 36—Sub-section 1—and as against the principal or *cestui que trust* only the title of the first indorsee under the restrictive indorsement specified in Section 36—Sub-sections 2 and 3 respectively."

Where a promissory note was indorsed by the payee to another "for collection" for the account of the payee, the indorsee had such a legal title as would authorize him to bring a suit in his own name. *Wilson v. Tolson*, 79 Ga. 137, but in such case he will hold the note subject to the same defenses that could have been made to it in the hands of the original payee.

Roberts v. Parrish, 17 Or. 583; Craig v. Palo Stock Farm, 16 Idaho 701.

SEE ALSO, Hook v. Pratt, 78 N. Y. 376; Freeman's Bank v. National Tuve Works, 151 Mass. 417; Regina Flour Mills v. Holmes, 156 Mass. 11; Spofford v. Norton, 126 Mass. 533; Cummings v. Kohn, 12 Mo. App. 585; Ward v. Tyler, 52 Pa. St. 393; Schmidt v. Pego, 172 Mich. 161; Metzger v. Sigall, 83 Wash. 80.

§ 68. **Qualified indorsement.** A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

The words "without recourse" accompanying an indorsement clearly indicate that the person making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability if the note is not paid at maturity upon due demand, or even if all the parties to the paper should prove to be wholly insolvent. Such indorsement effects a transfer of the title of the paper without imposing the liability of indorser. While he is thus not liable on the paper, yet certain liabilities are deemed to flow from the contract of sale on the principle that where personal property of any kind is sold, there is on the part of the vendee an implied warranty that he has title to it and that it is what it purports to be.

3 R. C. L. 1166; Drennan v. Dunn, 124 Ill. 175.

\$ 1000.00	Denver, Colo. July 30, 1917
Six months	after date
I promise to pay to the order of Eugene Stephenson	
One thousand no/100	Dollars
at Citizens Bank	
Value received	
Md. _____	Due _____
William C. Clark	

(INDORSED)

WITHOUT RECOURSE
EUGENE STEPHENSON

By the foregoing indorsement Eugene Stephenson guarantees that the signature of the maker is genuine; that the note is valid between the

original parties; that the makers were competent to contract; that the amount expressed therein is due and that there was no illegality in its inception. To avoid such guarantees it should be indorsed.

WITHOUT RECOURSE AND WITHOUT EXPRESSLY OR IMPLIEDLY WARRANTING ANY OF THE MATTERS CONTAINED IN OR WHICH GO TO THE MAKING UP OF THIS INSTRUMENT.

An indorsement without recourse is usually accompanied by the words, "without recourse," "at the indorsee's risk," "sans recourse," "to be enjoyed in the same manner as may have been by me," "without warranty," etc., etc., and means that the indorsee exempts himself from liability to indemnify the holder upon the dishonor of the bill or note.

To relieve one who indorses paper from liability on his indorsement, he must insert in the instrument itself words clearly expressing such an intention.

Fassin v. Hubbard, 55 N. Y. 465; Hailey v. Falconer, 32 Ala. 536; Schmidt v. Pegg, 172 Mich. 160; Craft v. Fleming, 46 Pa. St. 140.

The indorsement of a negotiable instrument "without recourse" is not sufficient to put the purchaser upon notice, and it does not impair the negotiable character of the instrument.

Banking Co. v. Hall, 119 Tenn. 548.

While an indorsement "without recourse" relieves the indorser of liability as a party to a bill or note, it does not relieve him if the instrument is not genuine or if he had no title to it, or if any prior party was incompetent.

Bell v. Dagg, 60 N. Y. 528.

The purpose of an indorsement without recourse is to transfer the title of an instrument without creating any personal liability on the part of the indorser.

Goolrich v. Wallace, 157 S. W. (Ky.) 920.

The indorsee of a note without recourse impliedly warrants that the signatures of prior parties whose names appear thereon are genuine.

State v. Bank, 139 Ia. 338; Ware v. McCormick, 96 Ky. 139; 28 S. W. 157.

He also impliedly warrants that he has title to the paper which gives him the right to sell it, but he does not warrant the solvency of maker.

Hecht v. Batcheller, 147 Mass. 335; Challis v. McCrum, 22 Kan. 157.

An indorsement "without recourse" in the absence of fraud releases the indorser from liability.

Cross v. Hollister, 47 Kan. 652.

An indorser "without recourse" of a note partially void for usury, is liable upon the implied warranty that the note is valid for the amount expressed upon its face.

Challis v. McCrum, 22 Kan. 157; *Meyer v. Richards*, 163 U. S. 385.

Hannum v. Richardson, 48 Vt. 508, where an indorser sold a negotiable promissory note without recourse. The note was void because given for intoxicating liquors in violation of law. It was claimed that the defendant knew of the invalidity of the note when he transferred it. The court held that knowledge on the part of the seller was not necessary to fix his liability, saying: "By indorsing the note 'without recourse' the defendant refused to assume the responsibility and the liability which the law attaches to an unqualified indorsement, so that in respect to such liability it was perhaps to be regarded as standing without an indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled that where personal property of any kind is sold there is on the part of the seller an implied warranty that he has title to the property and that it is what it purports to be and is that for which it was sold, as understood by the parties at the time; and in such case, knowledge on the part of the seller is not necessary to his liability. The note in question was not a note. It was not what it purported to be, or what it was sold and purchased for. It was of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his \$50. In this view of the case, we think the defendant is liable upon the warranty that the thing sold was a valid note of hand."

See also, *Drennan v. Bunn*, 124 Ill. 175.

The words "without recourse" need not precede the signature of the indorser. Where the payee of a note indorses his name at the right and opposite the words "without recourse" the words cannot be taken advantage of by subsequent indorsers.

Memphis, Tenn. May 10. 1917

Manhattan Savings Bank & Trust Co. 26-51

Pay to Grand E. May or bearer \$2000 =

Two thousand no/100 Dollars

And charge account No 4122 *A. Linn*

(INDORSED)

PAY TO THE ORDER OF SECURITY TRUST CO.

FRANK E. MAY

PAY TO THE ORDER OF FIRST NATIONAL BANK, N. Y.

SECURITY TRUST CO. WITHOUT RECOURSE

FIRST NATIONAL BANK, N. Y.

The only peculiarity about the above check is the indorsement of the Security Trust Company, without recourse. In view of the fact that the First National Bank, a responsible institution, has seen fit to indorse it, the check should be paid, as the words "without recourse" added to the indorsement of the Security Trust Company would not relieve the First National Bank or Frank E. May of responsibility.

A qualified indorsement may be made by adding to the indorser's signature the words "without recourse" and a transfer by indorsement of the "right and title" of the payee or an indorser to a negotiable instrument is equivalent to an indorsement "without recourse."

1 Dan. Neg. Inst. Sec. 700 and 700a; *Borden v. Clark*, 26 Mich. 410; *Evans v. Freeman*, 142 N. C. 66; *Thorp v. Mindeman*, 123 Wis. 151.

Parol evidence.—Where a note is endorsed by two persons and the words "without recourse" are added to such indorsement and occupy such position with reference thereto that ambiguity arises as to which of said indorsements they are intended to apply, parol evidence is admissible to show to which indorsement such words are applicable.

Goolrick v. Wallace, 154 Ky. 596; *Doll v. Gotzschmann*, 26 Am. & Eng. Ann. cases 880; *Rice v. Stearns*, 3 Mass. 225; *Pres. Fitchburg Bank v. Greenwood*, 84 Mass. 434; *Corbett v. Fetzer*, 47 Neb. 273; *Merchants Bank v. Vranson*, 165 N. C. 344.

§ 69. Conditional indorsement. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

An example of conditional indorsement may be found in the case of *Robertson v. Kensington*, 4 Taunt 30, where the indorsement on the draft was "Pay the within sum to Messrs. C. and R., or order upon my name appearing in the Gazette as ensign in any regiment in the line, within two months from date." The court held the indorsement was conditional and a payment to the subsequent indorsers was at the peril

of the persons paying, in case the conditions were not fulfilled. In other words the conditional indorsement did not absolutely transfer the title. This section therefore changes the law in this respect.

See also, Dan. Neg. Inst. 697.

§ 70. Indorsement of instrument payable to bearer.

Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Variant.—The Illinois statute substitutes for “payable to bearer” the words “originally payable to or indorsed specially to bearer.”


Where a bill of exchange or draft accepted was indorsed by the payee in blank and was by the next holder indorsed specially. *Held*, that the first indorsement being in blank, the bill was afterwards transferable by mere delivery, and that a holder by delivery may strike out the special indorsement and in a suit against the acceptors may declare and recover, as the indorsee of the payee.

Mitchell v. Fuller, 15 Pa. St. 268.

A check payable to a certain person or bearer need not be indorsed, nor the holder thereof be identified, and a bank paying such check without identification of the holder is not negligent.

Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64; Phoenix National Bank v. Saucier, 59 So. Rep. 91.

GENESEE VALLEY TRUST COMPANY

Rochester N.Y. June 10, 1917
to Bearer *\$165.00*
One hundred sixty five *Dollars*

George A. White

(INDORSED)
 GEORGE VAN ALSTYNE
 PAY TO THE ORDER OF
 JOHN DOE
 RICHARD ROE
 LINCOLN STATE BANK

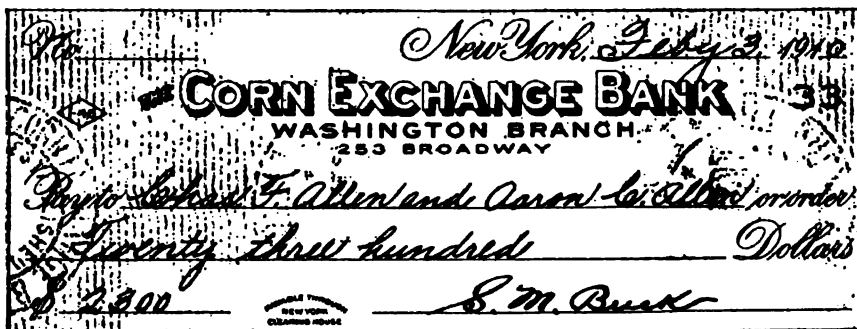
This check when delivered was payable to bearer and did not require indorsement and would be good in the hands of any person personally presenting it, and could be cashed without indorsement. Richard Roe by his indorsement converted it into an order check, and a cautious banker would require the indorsement of John Doe, which is missing.

A bill or note payable to order and indorsed in blank, so long as the indorsement continues blank is in effect payable to bearer.

Dan. Neg. Inst. Sec. 668-696; Greneaux v. Wheeler, 6 Texas 522; Ross v. Smith, 19 Texas 172; Hule v. Bailey, 16 La. 213; Little v. O'Brien, 9 Mass. 423; Johnson v. Mitchell, 32 Am. Rep. 602; Dugan v. United States, 3 Wheat. 172; See notes Sec. 66.

§ 71. Indorsement where payable to two or more persons. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Variant.—The Wisconsin statute inserts the word "joint" before "indorsees."



(INDORSED)
 CHARLES F. ALLEN
 AARON C. ALLEN
 By CHARLES F. ALLEN

Commercial paper, payable to two or more persons who are not co-partners, must be indorsed by all the payees in order to give good

title to the indorsee. Checks representing installments of the purchase price of lands owned by Charles F. Allen and Aaron C. Allen, two brothers, as tenants in common, made payable to both of such brothers, were mailed to Charles F. Allen, who indorsed both his own and his brother's names upon the checks and deposited them in a bank to his own individual credit. The brothers were not co-partners and Aaron C. Allen had not given to Charles F. Allen express authority to indorse his name on the checks. It appeared, however, that Aaron C. Allen had committed the entire details of the sale of the land and of the receipt of the purchase to Charles F. Allen; that he knew that installments of the purchase price had been paid from time to time; that he did not attack his brother's dealings with the checks until after the latter's death and until over four years after the last check was paid. Held, that a jury might properly find that the unauthorized act of Charles F. Allen in indorsing his brother's name upon the checks had been ratified by the latter.

Allen v. Corn Exchange Bank, 87 App. Div. N. Y. 335.

In Willis v. Green, 5 Hill 233, the court said, "It is a settled rule that co-payees, not partners, must each indorse in order to negotiate the paper." In Foster v. Hill, 36 N. H. 526, it was held, where a promissory note is made payable to two joint payees, their joint indorsement is necessary to negotiate it. In Bennett v. McGaughy, 4 Miss. 192, it is well settled that where a note is payable to two it must be indorsed by both. In Wood v. Wood, 16 N. J. L. 428, it was held, that one joint payee of a promissory note cannot indorse it, either in his own name alone or in his own name and that of his co-payee. In Smith v. Whiting, 9 Mass. 334, it was held, that one of two executors cannot assign a negotiable promissory note, made to them as executors, for a debt due to their testator. In Ryhiner v. Feickert, 92 Ill. 305, where a note was payable to the order of Charles and William Feickert, who were not partners, the court ruled that the note was not *prima facie* payable to a firm, and that the possession of one joint owner was not evidence of a partnership. In First National Bank v. Gridley, 112 App. Div. (N. Y.) 401 (a case since the adoption of the statute) it was held, that the indorsement of all the payees was necessary to give good title to the transferee. As to the right of survivorship of husband and wife in a certificate of deposit in the name of both, see, Martz v. State National Bank, 147 App. Div. (N. Y.) 250.

See Dan. Neg. Inst. Sec. 701a; Allen v. Corn Exchange Bank, 87 App. Div. (N. Y.) 335; 181 N. Y. 278.

Where a note is payable to either of two payees it may be transferred by the indorsement of one of them.

Voris v. Shoonover, 138 Pac. Rep. 607; Union Bank v. Spies, 151 Iowa 178. See notes, Sec. 27, Subd. 4.

Regardless of the provisions of this section, a negotiable instrument may be transferred without indorsement and the transferee becomes its owner, and can maintain an action thereon in his own name, it being, however, subject to all the equities and defenses which the debtor had at the time of the transfer against the claim in the hands of the previous holder.

Martz v. State National Bank, 147 App. Div. (N. Y.) 250.

§ 72. Effect of instrument drawn or indorsed to a person as cashier. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Under the common law the courts generally held that an indorsement to one as cashier was equivalent to an indorsement to the undisclosed bank, which is an exception to the general rule as to indorsement by agent as provided in Sec. 39.

Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Bank of New York v. Bank of Ohio, 29 N. Y. 619; First National Bank of Angelica v. Hall, 44 N. Y. 395.

Where it appears that the president of a bank in his official capacity conducted the making and transfer of commercial paper, his acts in relation thereto are binding on the bank.

Griffin v. Erskine, 131 Iowa 444.

A check drawn to the order of "Treas. of Town of Farmingham" in legal effect, stands upon the same footing as if payable to the town, and the money which it represented belongs to the town which was the real payee of the check.

Commercial Bank v. French, 21 Pick. 486; Quincy Mutual Insurance Co. v. Inter. Trust Co., 217 Mass. 373.

First National Bank v. McCullough, 50 Oregon 508, a case arising under the statute.

§ 73. Indorsement where name is wrongly designated or misspelled. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorsee the instrument as therein described, adding, if he think fit, his proper signature.

An indorsement by a person of the same name as the payee but not the real payee intended by the drawer is forgery, and no title is derived from such indorsement.

Weisberger v. Barbarton Bank (Ohio), 95 N. E. 379; *Graves v. Am. Exch. Bank*, 17 N. Y. 205; *Cochran v. Atchinson*, 27 Kan. 728; *Rossi v. Bank of Commerce*, 71 Mo. App. 570; *Beattie v. National Bank of Ill.*, 174 Ill. 571.

Where the name of the corporation was "L. Rosenberg, Incorporated" and the indorsement was "Louis Rosenberg, Inc.", is not such a variance as to make the indorsement ineffectual, especially as the corporation received all the benefits of the transaction with full knowledge of the facts.

Van Norden Trust Co. v. Rosenberg, 62 Misc. 285.

§ 74. Indorsement in representative capacity. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

Such an indorsement is usually "A by B as agent," or "B as agent for A" or "per procuration A (principal) B" (agent).

Where the name of a religious corporation indorsed upon a promissory note followed by the names of its president and treasurer, the words "finance committee" and the name of the persons constituting such committee, the indorsements come within the protection of this section and negatives any personal liability on the part of the individual signers.

Chelsea Exchange Bank v. First U. P. Church, 89 Misc. (N. Y.) 619.

As to the liability of executors or administrators, see *Schmittler v. Simon*, 101 N. Y. 554; *Schmittler v. Simon*, 114 N. Y. 186. See notes Sec. 39.

BIRMINGHAM, ALA. July 1 1917 No 1836

BIRMINGHAM TRUST & SAVINGS CO. INCORPORATED IN ALA.

PAY TO THE ORDER OF Union Iron Works \$ 244.72

Two hundred forty seven DOLLARS

Sidney Post

(INDORSED)

PAY TO MRS. EMMA BROOKS
 UNION IRON WORKS
 B. B. SHEPARD, MGR.
 EMMA BROOKS
 CHARLES F. CAREY

The above indorsement by B. B. Shepard, Mgr., is proper if so authorized by the Union Iron Works, but without knowledge the paying bank should investigate the authority of Shepard to so indorse. The indorsement of "Emma Brooks" without prefixing the Mrs. is immaterial.

§ 75. Time of indorsement; presumption. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

Upon the trial the plaintiff produced the note, proved the indorsement of the payee and the signature of the maker and introduced it in evidence. Thus, the plaintiff established *prima facie* that it became the owner of the note before it became overdue, in good faith and for value and without notice of any infirmity in the instrument.

German American Bank v. Cunningham, 97 App. Div. (N. Y.) 246; *Colborn v. Arbecam*, 54 Misc. 623, 104 N. Y. Supp. 986.

An indorsement of a promissory note, in the absence of evidence to the contrary, is presumed to have been made at or about the date of the note.

Mason v. Noonan, 7 Wis. 609.

The indorsement of a promissory note after maturity is, in effect, the drawing of a new bill payable on demand, and, to hold the indorser, demand and notice of non-payment are essential.

Smith v. Caro, 9 Oregon 278; see also, Cedar National Bank v. Bashara, 39 Okla. 482.

§ 76. Place of indorsement; presumption. Except where the contrary appears every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

A married woman who, at her residence in the State of New Jersey, indorsed in blank and solely for his benefit, her husband's promissory note, dated and payable in the State of New York, where it is discounted in good faith, without notice that the indorser was a non-resident, or that the indorsement was made in another state, is estopped from denying that her indorsement is a New York contract and from claiming it a New Jersey contract, the laws of which state do not permit a married woman to become a simple accommodation indorser; but if she had written her place of residence after her name the plaintiff would have been put upon inquiry as to the validity of such a contract made in that state.

Chemical National Bank v. Kellogg, 183 N. Y. 95; see also, Dan. Neg. Int. Sec. 728; Maxwell v. Vansant, 46 Ill. 58; Belford v. Bangs, 15 Ill. App. 76; Towne v. Rice, 122 Mass. 67; Glidden v. Chamberlain, 167 Mass. 486.

A bill drawn in Illinois and delivered to drawee in New York, is governed by the law of the latter place, but if in good faith it is made payable in the former state, any rate of interest, not exceeding that there allowed, may be reserved.

Freese v. Brownell, 35 N. J. L. 285.

A negotiable instrument is presumed to have been made where it is dated, and hence an action upon a promissory note dated at the City of New York must be deemed to be brought on a contract made in that state.

Manufacturers' Commercial Co. v. Blitz, 131 App. Div. (N. Y.) 17; Chemical National Bank v. Kellogg, 183 N. Y. 92.

§ 77. Continuation of negotiable character. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

A bill or note does not lose its negotiable character by being dishonored, and the indorsement although made after dishonor, follows the

nature of the original contract, and is negotiable unless it contains express words of restriction.

Leavitt v. Putnam, 3 N. Y. 494; McSherry v. Brooks, 46 Md. 118.

Where an indorser takes up a promissory note, after it has been dishonored, by paying the amount of it to the holder, the transaction is in effect a re-purchase of the note, and not a payment of it, and the indorser becomes vested again with all rights which he formerly had against prior parties on the paper.

French v. Jarvis, 29 Conn. 347.

A note once negotiable remains so until paid, the fact that it becomes overdue does not destroy its negotiability.

Adair v. Lenox, 15 Oregon 489.

A note indorsed after it became due is considered payable on demand, and the demand and notice must be made in a reasonable time.

Rosson v. Carroll, 90 Tenn. 110; Graul v. Strutzel, 53 Iowa 712; Gray v. Bell, 44 Am. Dec. 277.

As to discharge see Sections 200-206.

§ 78. Striking out indorsement. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Variant.—The Kentucky statute substitutes the word “owner” for “holder,” probably an error in engrossing.

This is declaratory of the law as it existed prior to the enactment of the statute.

Vanarsdale v. Hax, 107 Fed. 878, 880 and cases cited; Mitchell v. Fuller, 15 Pa. St. 268; Rand v. Dovey, 83 Pa. St. 281; Merz v. Kaiser, 20 La. Ann. 379.

The holder of a negotiable instrument indorsed in blank is *prima facie* the owner thereof, and the mere erasure of previous indorsements does not destroy the presumption.

King v. Bellamy, 82 Kans. 301, 108 Pac. Rep. 117.

See also, New Haven Manufacturing Co. v. New Haven Pulp and Board Co., 76 Conn. 127; Ensign v. Fogg, 177 Mich. 317; Quimby v. Varnum, 190 Mass. 211.

§ 79. Transfer without indorsement; effect of. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the trans-

feree such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Variant.—The Colorado statute adds at the end of the first sentence “if omitted by mistake, accident or fraud.” The Illinois and Missouri statutes change after the word “right” in the first sentence by substituting the following, “to enforce the instrument against one who signed for accommodation of his transferrer, and the right to have the indorsement of the transferrer, if omitted by accident or mistake.” The Wisconsin statute adds at the end of the section, “When the indorsement was omitted by mistake or there was an agreement to indorse made at the time of the transfer, the indorsements when made, relates back to the time of transfer.”

This section does not affect the provisions of Sections 60 and 61.

A purchaser of a draft or check who obtains title without an indorsement by the payee, holds it subject to all the equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses.

Gosen National Bank v. Bingham, 118 N. Y. 349; *Meuer v. Phoenix National Bank*, 94 App. Div. (N. Y.) 331; *Manufacturers, etc. Co. v. Blitz*, 131 App. Div. (N. Y.) 17; *Bank of Bromfield v. McKinley*, 53 Colo. 279; *Mayers v. McRimmon*, 140 N. C. 640; *Landis v. White*, 127 Tenn. 506; *Meuer v. Phoenix Bank*, 42 Misc. 341.

Where a depositor has imposed the condition that his check shall not be paid without it bears his indorsement, the bank, if it pays it to a holder without such indorsement, runs the risk of the transaction, and takes the burden of showing that such holder has acquired in some way the lawful title to receive the funds.

Lynch v. First National Bank of Jersey City, 107 N. Y. 184.

No indorsement is necessary to invest the holder with the presumption of ownership in due course, and this presumption is indulged until overcome by proof supported by evidence.

Callahan v. Louisville Dry Goods Co., 140 Ky. 714.

Both before and since the enactment of the statute, it has been held that to constitute a order in due course of a negotiable instrument, payable to order, it is always required that the same should be indorsed.

Mayers v. McRimmon, 140 N. C. 643.

A negotiable instrument bearing no indorsement is subject to attachment and sale under execution.

Fishburn v. Londershausen, 50 Or. 363.

For the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Manufacturers' Commercial Co. v. Blitz, 131 App. Div. (N. Y.) 18.

In an action upon a promissory note, where the plaintiff alleges a legal title thereto by indorsement, it may be doubted whether the mere physical possession of the note upon the trial is sufficient to support the allegation.

Brown v. Janes, 71 Misc. 316.

A certificate of deposit, though payable to the order of the depositor on the return of the certificate properly indorsed, may be transferred by the payee without indorsement, and where she owns the whole as survivor, her right in no way depends upon a transfer from the indorsement of the certificate by her husband's personal representative.

Martz v. State National Bank, 147 App. Div. (N. Y.) 250; *see also*, Rivenburg v. First National Bank, 103 App. Div. (N. Y.) 67; Manufacturers Commercial Co. v. Blitz, 131 App. Div. (N. Y.) 19; Martz v. State National Bank, 147 App. Div. (N. Y.) 252; Barker v. Barth, 192 Ill. 460; Lancaster National Bank v. Taylor, 100 Mass. 23; Kiefer v. Tolbert, 128 Minn. 519; Bank of Madison v. Stam., 186 Mo. App. 439; Carter v. Butler, 264 Mo. 324; O'Connor v. Slatter, 48 Wash. 498; Marling v. Fitzgerald, 138 Wis. 93.

§ 80. When prior party may negotiate instrument. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, re-issue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

See notes Section 202.

ARTICLE 6**Rights of Holder**

Section 90. Right of holder to sue; payment.

91. What constitutes a holder in due course.
92. When person not deemed holder in due course.
93. Notice before full amount paid.
94. When title defective.
95. What constitutes notice of defect.
96. Rights of holder in due course.
97. When subject to original defenses.
98. Who deemed holder in due course.

§ 90. Right of holder to sue; payment. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

The term "holder" as applied to negotiable paper, has always had the well-recognized legal meaning of the payee or indorsee of it, entitled to receive the sum for which it calls. With us the term is now statutory and it means the payee or indorsee of a bill or note, who is in possession of it, or bearer thereof.

Olson v. Rosenbloom, 247 Pa. St. 250.

The owner and holder of the legal title to a promissory note may maintain an action to enforce collection thereof, even though a third party may be entitled to the proceeds.

Stanley v. Penny, 75 Kan. 179; *New Haven Mfg. Co. v. New Haven Pulp Co.*, 79 Conn. 127.

Reading this section in connection with Sections 2, 79 and 98, it is evident that the holder of a note is deemed to be the holder in due course, that is, to have come lawfully into possession of it; and he may maintain an action in his own name. No indorsement is necessary to invest the presumption of ownership, but possession alone presupposes ownership in due course.

Callahan v. Louisville Dry Goods Co., 140 Ky. 714.

A transferee of a promissory note who takes the same before maturity in settlement of a precedent debt, takes it subject to all infirmities.

Union Nut and Bolt Co. v. Doherty, 20 Misc. 23.

Pleadings.—A complaint which in substance alleges the making of a promissory note by defendants, by which they agreed to pay to the order of the plaintiff, a certain sum of money and that no part thereof has been paid, states a cause of action. The allegation that the note was “made” by defendants is equivalent to an allegation that it was both signed and delivered. It is not necessary to allege a consideration, as that is presumed.

First National Bank of Pittsburgh v. Stallo, 160 App. Div. (N. Y.) 702.

Where the plaintiff, in an action upon a promissory note, is the payee thereof, the production of the note is sufficient, and the objection of the defendant to its admission because no witness testified as to who was the holder of it cannot avail.

Williams v. Holt, 170 Mass. 351.

Section generally see, Owen v. Storms, 72 Atl. 441; Tullis v. McClairy, 128 Ia. 495; Lowell v. Bickford, 201 Mass. 543; Tyson v. Joyner, 139 N. C. 71; Smith v. Bayer, 46 Or. 143; Poess v. Twelfth Ward Bank, 43 Misc. 48; Schlesinger v. Kurzrok, 47 Misc. 636; Cleary v. Debeck Co., 54 Misc. 537; Marling v. Nommensen, 127 Wis. 363.

§ 91. What constitutes a holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

The reason for the rule embodied in this section was admirably expressed by Justice Vann in *Chemical National Bank v. Kellogg*, 183 N. Y. 94. “The business of the country is done so largely by means of

commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to damage trade and hinder the transaction of business. Commercial necessity requires that only slight evidence should be insisted upon to establish an estoppel *in pais* as to the validity of commercial paper. The only practical rule is to make the face of the paper itself, when free from suspicion, sufficient evidence, in the absence of notice, against all who aided to put it into circulation in that condition, unless the note is void by the positive command of a statute, such as the act of usury. No other rule would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount. It is better that there should be an occasional instance of hardship than to have doubt and distrust hamper a common method of making commercial exchange."

Subd. 1.—A party purchasing commercial paper which remains in some essential incomplete and imperfect does not acquire the character of a *bona fide* holder, unless authority is reposed in some one to supply anything needed to make it perfect.

Davis Sewing Machine Co. v. Best, 105 N. Y. 67; Dan'l Neg. Int. Sections 841, 842; Hunter v. Allen, 127 App. Div. (N. Y.) 574.

The addition of the words "payable with interest" to a negotiable note, in the same handwriting as the body of the note, written on the blank space after the words "value received," at the most appropriate place on the note on which it could be written without interlining them (in the absence of anything on the face of the note to show that it had been altered or to awaken suspicion) does not render the note incomplete within the meaning of this section.

American Bank of Orange v. McComb, 105 Va. 473.

Where an inspection of a check shows that the date has been changed, a purchaser thereof has notice of its infirmity and cannot recover thereon, as a holder in due course.

Elias v. Whitney, 50 Misc. 326.

That the payee of a check may be a holder in due course if he complies with the requirements of the Negotiable Instruments Law has been held, among other cases, in Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; Thorpe v. White, 188 Mass. 333, 74 N. E. 592, and Brown v. Brown, 91 Misc. Rep. 220, 154 N. Y. Supp. 1098; Buzzel v. Tobin, 201 Mass. 1.

Subd. 2.—An indorsee of a promissory note, taking it as collateral security for an antecedent debt without other consideration, but in good faith and before maturity, occupies the position of a holder for value.

Continental National Bank v. Townsend, 87 N. Y. 8.

The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course.

Citizens' State Bank v. Cowles, 180 N. Y. 349; Albany County Savings Bank v. Peoples' Co-Op. Ice Co., 92 App. Div. (N. Y.) 47; Thompson v. Sioux Falls Bank, 150 U. S. 231; Dykman v. Northbridge, 80 Hun. 258; Fox v. Bank of Kansas City, 30 Kans. 441; U. S. National Bank v. McNair, 114 N. C. 335; Fredonia National Bank v. Tommei, 131 Mich. 674; First National Bank v. McNairy, 122 Minn. 215; Morrison v. Farmers and Merchants Bank, 9 Okla. 697.

A note dated Sept. 21st was made payable one day after date. One purchased the note on the day after its date. Held, that as the note was not overdue at any time on the day after its date the purchaser was a holder for value.

Wilkins v. Usher, 123 Ky. 697.

A purchase for value of negotiable paper after maturity is not a *bona fide* purchaser to the extent of being protected in his purchase against the rightful owner, from whom it had been stolen, unless he has succeeded to the rights of a *bona fide* purchaser before maturity.

Northampton National Bank v. Kidder, 106 N. Y. 221.

One who signs a note without reading it when he can read and has an opportunity to do so, his signature being obtained through misrepresentation as to the character of the instrument, cannot set up his own omission against one who becomes a *bona fide* holder by discounting it for value before maturity.

Munnich v. Joffe, 164 App. Div. (N. Y.) 30; Marks v. First National Bank, 58 Am. Rep. (Ala.) 550.

One who cashes a check for full value within a reasonable time after it was delivered to the payee, without knowledge of any invalidity, either in its inception or in its indorsement and transfer, is a *bona fide* holder of a negotiable instrument before maturity for value, and can recover from the drawers thereof.

Poshkoff v. Bernstein, 159 N. Y. Supp. 206; see also, Jacobus v. Jamestown Mantel Co., 149 App. Div. (N. Y.) 356; Austin v. Bank of Scottsville, 150 Ky. 113; Johnson Co. Savings Bank v. Walker, 79 Conn.

348; Shawmut National Bank v. Manson, 168 Mass. 425; Kernohan v. Durham, 48 Ohio St. 1; Lindsay v. Dutton, 217 Pa. St. 148; Quiggle v. Herman, 131 Wis. 379; Northfield National Bank v. Arnot, 132 Wis. 383.

Subd. 3.—As to what constitutes value see Sec. 51, 52. The action of a bank in discounting a promissory note and placing the avails thereof to the payee's credit, does not of itself constitute the bank a *bona fide* holder for value of the note.

Consolidation Bank v. Kirkland, 99 App. Div. (N. Y.) 121; Merchants' National Bank v. Santa Maria Co., 162 App. Div. (N. Y.) 249.

The bank does not become a holder for value until it has paid over the proceeds of the note to the payee.

Albany County Bank v. Peoples' Ice Co., 92 App. Div. 48; Miller v. Norton, 114 Va. 610; Thompson v. Sioux Falls Bank, 150 U. S. 231; N. Y. County Bank v. Massey, 192 U. S. 138, 145; Dan. Neg. Int. Sec. 779b.

It is quite generally held by the courts that the mere transaction of discounting a note and crediting the amount on the books, without more, does not constitute the bank a holder in due course. The credit must be absorbed by antecedent indebtedness or subsequent withdrawals. However, a bank which discounts a promissory note, crediting the proceeds to the indorser's account, which becomes exhausted before the maturity of the note, is a purchaser for value, notwithstanding the indorser subsequently has deposits equal to the amount of the note (Fredonia National Bank v. Tommei, 131 Mich. 674; First National Bank v. McNairy, 122 Minn. 215 [holding that in determining whether such credit has been exhausted, the rule is to be applied that as checks are paid the amount is to be charged against the oldest item of deposit or credit of the customer]; Dreilling v. Bank, 43 Kan. 197; Shawmut National Bank v. Manson, 168 Mass. 425; Second National Bank v. Weston, 170 N. Y. 250; Hatch v. New York City 4th National Bank, 147 N. Y. 184; Oppenheimer v. Radke & Co., 20 Cal. App. 518; McCasland v. Southern Ill. National Bank, 127 Ill. App. 37; Choteau Trust Co. v. Smith, 133 Ky. 418; Symonds v. Riley, 188 Mass. 470).

In Merchants' National Bank v. Santa Maria Sugar Co., 147 N. Y. Supp. 498, plaintiff bank discounted for a customer before maturity, the note sued on crediting the proceeds of the discount to the customer's account, which account at all times prior to the dishonor of the note contained a balance in the customer's favor in excess of the amount due on the note, but if the earliest credits were applied to the earliest debits the proceeds of the discount would have been paid out prior to any notice acquired by the bank of any infirmity in the note. It was held that,

while the bank did not become a purchaser for value by merely crediting the proceeds of the discount to the customer's account, it did acquire such position when the proceeds were paid out, and that the same should be treated as paid out by an application of the rule that the first items on the debit side were chargeable against the first items on the credit side of the account.

In the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a *bona fide* holder for value, and this presumption is not repelled merely by proof that the bill or note as between the immediate parties was without consideration.

Mitchell v. Baldwin, 88 App. Div. (N. Y.) 268; Harger v. Worrall, 69 N. Y. 370; Cluett v. Couture, 140 App. Div. (N. Y.) 830.

When a check is deposited at a bank it is generally for collection by the bank as agent of the depositor, and the bank does not owe the amount until its collection is accomplished.

National Bank v. Miller, 77 Ala. 173, 54 Am. Rep. 50; Fayette National Bank v. Summers, 105 Va. 693.

What constitutes good faith upon the part of a holder of negotiable paper has been defined in the following language:

"He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail." Cheever v. Pittsburgh Ry. Co., 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646.

The term "good faith" means not only honesty of intention, but the absence of suspicious circumstances, or, if such circumstances exist, then such inquiry as will satisfy a prudent man of the validity of the transaction.

Pennington Bank v. Moorehead Bank, 125 N. W. (Minn.) 119; Williams v. Huntington, 13 Atl. (Md.) 336.

Where the negotiable paper signed by a person considered to be solvent is sold at a very large discount, such circumstance alone is sufficient to require the purchaser to make inquiry as to the genuineness thereof; if he fails to make such inquiry he is not to be deemed a *bona fide* purchaser,

and in any case the fact that the paper was purchased at a discount may, in connection with other circumstances, rebut the presumption that the holder is one in due course.

Vosburg v. Diefendorf, 119 N. Y. 357; Griffith v. Shipley, 74 Md. 591; Canajoharie National Bank v. Diefendorf, 123 N. Y. 191.

One who purchases notes calling for the payment of \$7,500 in good faith and before maturity, is a holder in due course, although he pays only \$5,000 for the notes.

Moore v. Burling, 160 Pac. (Wash.) 420; Ham v. Merritt, 149 S. W. (Ky.) 11; Citizens Bank v. Stewart, 22 Col. App. 91.

The mere possession of the note by the plaintiff raises a presumption, without other evidence, that he is a holder in good faith, and it is not until it has been shown by appropriate evidence that the instrument was procured and put in circulation by fraud that any burden is cast upon him to explain his possession, and give affirmative evidence that he acquired title in due course of business and without notice of the fraud.

Cox v. Cline, 139 Iowa, 128, 117 N. W. 48.

The purchaser of a note for considerably less than the face value from an entire stranger, without any knowledge or inquiry into the financial responsibility of its maker or indorsers, can hardly be said to show that the purchaser was a holder in due course; on the contrary, it tends to indicate that a disclosure of the whole truth would have been fatal to that claim.

Harris v. Johnson, 89 Conn. 128; Stewart v. Lansing, 104 U. S. 505; King v. Doane, 139 U. S. 166.

What constitutes good faith has been the subject of frequent discussion, and while a difference of opinion may exist on some points, there is perfect uniformity in the decisions that the want of good faith in the transaction is fatal to the title of the holder, and that gross carelessness, although not sufficient of itself as a question of law to defeat title, constitutes evidence of bad faith.

C. N. Bank v. Diefendorf, 123 N. Y. 202; Seybel v. N. C. Bank, 54 N. Y. 288; Duchess Co. M. Ins. Co. v. Hachfield, 73 N. Y. 228; Dan. Neg. Int. Sec. 819; Am. Exchange Bank v. N. Y. Belting Co., 148 N. Y. 705; Knox v. Eden Musee Co., 148 N. Y. 454; Jarvis v. Manhattan Beach Co., 148 N. Y. 652; Cheever v. Pittsburgh R. R., 150 N. Y. 66; 44 N. E. 701, 34 L. R. A. 69; Ward v. City Trust Co., 192 N. Y. 73; Cole v. Harrison, 167 App. Div. (N. Y.) 336; Oliver v. Goldberg, 168 App. Div. (N. Y.) 874; McBee Co. v. Shoemaker, 160 N. Y. Supp. 251.

A gift of a negotiable instrument to a third party is not such a negotiation of it in the usual course of business as to give to the donee the full protection which is extended to a *bona fide* holder for value.

Greer v. Orchard, 175 Mo. App. 494; Dan. Neg. Int. Sec. 181.

If one purchases an accommodation note for cash and sells it to a *bona fide* purchaser in exchange for the purchaser's own note, the purchaser may be found to be a holder of the note in due course within the meaning of this section.

Methlinger v. Harriman, 185 Mass. 245.

Notice or knowledge of an infirmity existing in a negotiable instrument which will invalidate in the hands of an indorsee must be actual, or of such facts that his action in taking it amounts to bad faith; and where the facts shown have any tendency to show bad faith the question is one of fact.

McNight v. Parsons, 136 Iowa 391.

Where a promissory note payable "to the order of A or B," is indorsed by "A" only, to one who takes it in good faith, for value and without any notice of infirmity in the instrument or defect in title, the indorsee is a holder in due course.

Voris v. Schoonover, 91 Kans. 530; Union Bank v. Spies, 151 Iowa 178, 130 N. W. 928.

It may be stated as a rule that suspicious circumstances alone, even though sufficient to put an ordinarily prudent person on inquiry, will not, in the absence of bad faith or a willful disregard of the facts showing an infirmity of the paper, destroy the title of the taker as that of a *bona fide* holder.

Walters v. Rock, 115 N. W. Rep. 514; Sinkler v. Siljan, 136 Cal. 356; Mass. National Bank v. Snow, 187 Mass. 159; Robbins v. Swinburne Co., 91 Minn. 491; Second National Bank v. Morgan, 165 Pa. 199; Smith v. Livingston, 111 Mass. 342; Goetting v. Day, 87 N. Y. Supp. 510; Cole v. Harrison, 167 App. Div. 336.

As to a payee as holder in due course.—The question as to whether a payee taking a bill or note without inquiry and for value from one other than the drawer or maker can enforce in free from equities is not free from doubt. The question seems has not been raised in New York, excepting a reference thereto in Schreyer v. Bailey, 89 Supp. 870, and Empire T. Co. v. Manhattan Co., 162 Supp. 630. In other jurisdictions, however, held that a payee is entitled to the same protection under the section as any other *bona fide* holder for value.

Boston Steel and Iron Co. v. Steuer, 183 Mass. 140; Thorpe v. White, 188 Mass. 333, 334; Mersick v. Alderman, 77 Conn. 634; South Boston Iron Co. v. Brown, 63 Me. 139; Campbell v. 4th National Bank, 137 Ky. 555; Glascock v. Rand, 14 Mo. 550; American Exchange National Bank v. Armstrong, 133 U. S. 443, 453; Hodges v. Nash, 141 Ill. 391; Cagle v. Lane, 49 Ark. 465; Daniel on Negotiable Instruments, Section 178;

Payson on Bills and Notes, pp. 181, 199; Van Ploeg v. Van Zuuk, 135 Ia. 350; 13 L. R. A. 490; Long v. Shafer, 185 Mo. App. 641, 171 S. W. 690.

The assignment of notes before maturity to a bank, as collateral for a loan, without notice of any equities between the original parties, makes the bank a holder in due course. The defense of want of consideration is not available against the bank.

McLean Co. Bank v. Brown, 187 S. W. Rep. 785.

Cases on the subject generally, see, Campbell v. Fourth National Bank, 137 Ky. 555; Benedict v. Kress, 97 App. Div. (N. Y.) 67; National Park Bank v. Saitta, 127 App. Div. (N. Y.) 624; Hurst v. Lee, 143 App. Div. (N. Y.) 614; Laschinsky v. Margoles, 129 App. Div. (N. Y.) 529; Strickland v. Henry, 66 App. Div. (N. Y.) 24; Wallabout Bank v. Peyton, 123 App. Div. (N. Y.) 727; Wiser v. Osteyee, 24 Misc. 704; Bank of Monongahela v. Weston, 172 N. Y. 268; R. and C. Turnpike Co. v. Paviour, 164 N. Y. 281; Com. National Bank v. State Bank, 132 Ia. 706; Thorke v. White, 188 Mass. 333; Mehlinger v. Harriman, 185 Mass. 245; White v. Dodge, 187 Mass. 449; Banking Co. v. Hall, 119 Tenn. 550; Glascock v. Rand, 14 Mo. 550; Eagle v. Lane, 49 Ark. 465; Brown v. Brown, 91 Misc. 222; Mersick v. Alderman, 77 Conn. 634; Campbell v. 4th National Bank, 137 Ky. 555; Hodges v. Nash, 141 Ill. 391; Vander Ploeg v. Van Zuuk, 135 Iowa 350; 29 L. R. A. 351; 44 L. R. A. 395; Oliner v. Golden, 168 App. Div. (N. Y.) 874.

Subd. 4.—As to what constitutes notice see, Sec. 95.

In an action by the indorsee of a bill of exchange, if it appears on the part of defendant that the defendant or a prior party made it under duress, or was defrauded of it, or had only part of its value, the plaintiff must be prepared to prove under what circumstances and for what value he became the holder.

Chitty on Bills, 12 Am. ed. Sec. 648; C. N. Bank v. Diefendorf, 123 N. Y. 204.

One who takes negotiable paper for value before due, without actual notice of any defect therein, has the right to assume that the relations to the paper of every party, whose name appears on it are precisely what they appear to be.

Cheever v. Pittsburgh, etc. R. R., 150 N. Y. 59.

Mere surmise or suspicion is not sufficient to put a purchaser upon inquiry. The facts or circumstances to put him on inquiry must be such as to show dishonesty or bad faith on his part in refraining from making inquiry.

Manhattan Sav. Inst. v. N. Y. National Exch. Bank, 170 N. Y. 58; Bank of Monongahela v. Weston, 172 N. Y. 259; Perth Amboy Loan

Assn. v. Chapman, 178 N. Y. 558; *Hibbs v. Brown*, 112 App. Div. (N. Y.) 224; *Dan. Neg. Inst. Sec.* 1503; *Blum v. Davis*, 159 N. Y. Supp. 206.

A person taking a check drawn by a guardian upon an account standing in his name as such is put upon inquiry to ascertain the authority of the guardian to use the money, and where it is misapplied the infant can compel an accounting for the amount.

Cohnfeld v. Tanenbaum, 176 N. Y. 126; *Empire State Surety Co. v. Nelson*, 141 App. Div. 850.

The maker of a negotiable promissory note, which on its face, purports to be for value received and negotiated before maturity, cannot escape liability upon what is at most a mere guess, that the purchaser had knowledge at the time of the purchase of some agreement between the maker and payee. Were the rule otherwise, there would be no safety in purchasing commercial paper.

Heinbach v. Doubleday, Page & Co., 130 App. Div. (N. Y.) 37.

Where a bill or note is indorsed by a person in an official capacity, as by Executor, Trustee, or Guardian, etc., the purchaser is put on inquiry.

People v. Bank of N. A., 75 N. Y. 547; *Strong v. Strouss*, 40 Ohio St. 87; *Langdon v. Bank*, 52 Am. Rep. (Vt.) 113.

When the word executor, administrator, trustee, guardian or the like when appended to the name of the payee of a bill, note or check, is sufficient to charge a purchaser with notice of the restrictions and limitations of his powers to dispose of the instrument. The term is a warning to every one who reads it that the payee named is not the owner and that he holds it for the use and benefit of another and that he has no right to sell or dispose of it without authority.

State v. Jahrus, 41 S. Rep. 575; 117 La. 286; *Henshaw v. State Bank*, 239 Ill. 515; *Hazletine v. Keenan*, 54 W. Va. 600; 46 S. E. 609; *Geyser Co. v. Stark*, 106 Fed. 558; *Bucher v. Buckingham*, 18 Conn. 110.

Where a bank discounts negotiable paper void for usury, but in good faith and without knowledge of its previous taint, it is not deprived of the right to collect it from the maker.

Schlessinger v. Gilhooly, 189 N. Y. 1.

But where discounted with knowledge see, *Schlessinger v. Leahmaier*, 191 N. Y. 69.

This section does not mean that when the title of the holder of a note indorsed in blank, which has been accepted by a bank as collateral security, is shown to be defective, the bank must prove that it accepted the note before it was overdue, but means that the bank must prove that at the time the note was negotiated to it it had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Justice v. Stonecipher, 267 Ill. 448; Savings Bank v. Claussen, 137 Iowa 72.

A negotiable promissory note is not dishonored by reason of the failure to pay interest prior to maturity of the principal, in the absence of a stipulation to that effect; but the fact that interest is due and unpaid is a material circumstance bearing on the question of whether the purchaser acquired the note in good faith and without notice of prior equities of infirmities in the title.

McPherrin v. Tittle, 36 Okla. 510; Dan. Neg. Int. Sec. 787.

The purchaser of a past-due note takes it with notice of any defense to the note which the maker may have, but does not take it with notice of the secret equities of third persons.

Kempner v. Huddleston, 90 Tex. 184, 37 S. W. 1066; Cordage Co. v. Seymour, 67 Minn. 311, 69 N. W. 1082; Moffett v. Parker, 71 Minn. 139, 73 N. W. 851, 70 Am. St. Rep. 319; Layman v. Vicknair, 47 La. Ann. 679, 17 South. 265; Bank v. Garlick, 137 La. 282, 68 South. 611; Dulin v. Hunter, 98 Ala. 539, 13 South. 301; Porter v. King (D. C.) 1 Fed. 760; Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11; Gymnasium Co. v. Vank, 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, 70 Am. St. Rep. 135; Justice v. Stonecipher, 267 Ill. 448, 108 N. E. 723; Jones on Mortgages, Sec. 843.

Action by the transferee of a draft against the acceptor. It appeared that the defendant, a foreigner, unable to read English, had entered into a contract with a manufacturing jewelry company by which he was to sell their jewelry on commission, but was not to be charged for any goods which he was unable to sell. Later, on the day the jewelry was received, he was induced by another agent of the vendor to sign four documents under the representation that the goods were sent on commission and that the papers were to be held merely as collateral security. The papers were in fact drafts which the defendant, by his signature, accepted and which by transfer came into the hands of the present plaintiff, a bank located in a town in a foreign State where the jewelry company had its place of business. It further appeared that the jewelry received by the defendant was worthless, that he had returned the same and repudiated all liability. On all the evidence,

Held, that the jury was justified in finding that the acceptance of the defendant was procured by active fraud and deceit, and to find further that the plaintiff was not a *bona fide* holder in due course, even though, with the assistance of the jewelry company, it gave testimony to that effect.

Johnson Co. Savings Bank v. Komhauser, 174 App. Div. (N. Y.) 136; but see Kellogg v. Hale, 190 Ill. 15; National Bank v. Hall, 151

N. W. (Ia.) 120; cited in notes Section 94, fraud; Chapman v. Rose, 56 N. Y. 137, note Section 91, Subdivision 4.

On the subject generally, see, Morton v. New Orleans, etc. Ry., 79 Ala. 590; Groh's Sons v. Schneider, 34 Misc. 196; Bank of North America v. Kirby, 108 Mass. 497; McLane v. Placeville S. V. Ry., 66 Cal. 606; Town of Ontario v. Hill, 99 N. Y. 324; Armstrong v. Am. Ex. Bank, 133 U. S. 434; Bergstrom v. Ritz-Carlson Co., 157 N. Y. Supp. 962; Brown v. Brown, 91 Misc. 220; Boston Steel and Iron Co. v. Steuer, 183 Mass. 140; Thorpe v. White, 188 Mass. 333; Carpenter v. Hoadley, 138 App. Div. (N. Y.) 190; Citizens Savings Bank v. Couse, 68 Misc. 153; Liberty Trust Co. v. Tilton, 217 Mass. 462; Nat. Investment and Surety Co. v. Corey, (Mass.) 111 N. E. 357; Johnson v. Kettell v. Longly, 207 Mass. 52, 56; Merchants Bank v. Branson, 165 S. C. 344; Central Trust Co. v. First National Bank, 101 U. S. 68; Hughes v. Flint, 61 Wash. 460; Goshen Bank v. Bingham, 118 N. Y. 349.

\$ 700.00	St. Louis, Mo. June 30, 1915
Six months	after date I promise to pay to
the order of Wonder Stock Powder Company	
Seven hundred no/ee	Dollars
at First Nat Bank, St. Louis, Mo.	
Value received with interest	
For _____	Due _____
	A. K. Long

A promissory note was made payable to "Wonder Stock Powder Co." The only indorsement is "James J. Doty, Prop." A banker who purchased it testified that Mr. Doty was the sole owner of the company, but there was no evidence as to whether the payee was a corporation or a trade name for Doty. Held, that the indorsement did not constitute the bank a holder in due course, and the note was subject to the same defenses as might be set up against the original payee.

First National Bank v. Kelgord, 91 Mo. App. 178; Freeman v. Perry, 22 Conn. 617; Ellis v. Brown, 6 Barb. (N. Y.) 282.

One taking a note with full knowledge that the consideration had failed, is not a holder in due course, and is subject to the defense of failure of consideration.

Washington Trust Co. v. Keyes, 88 Wash. 287.

As to instruments stolen before delivery. see notes Section 35.

§ 92. When person not deemed holder in due course.
Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

A promissory note payable on demand, with interest, is a continuing security; an indorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time.

Merritt v. Todd, 23 N. Y. 28; *Pardee v. Fish*, 60 N. Y. 271; *Parker v. Stroud*, 98 N. Y. 379.

No cause of action against an indorser of a promissory note payable on demand, at a place specified, until demand is made in compliance with the terms of the contract and due notice of non-payment.

Parker v. Stroud, 98 N. Y. 379.

But as against the maker no demand is necessary before suit, the suit itself being sufficient demand.

Herrick v. Woolverton, 41 N. Y. 581; *Wheeler v. Warner*, 47 N. Y. 520; see Sections 26, 131.

A promissory note, payable on demand, is due forthwith, and an action thereon against the maker is barred by the statute of limitations.

Wheeler v. Warner, 47 N. Y. 519.

Until a demand is made at the place named, the statute of limitations does not begin to run in favor of the indorser.

Parker v. Stroud, 98 N. Y. 379; *Berkshire Bank v. Jones*, 6 Mass. 524; *Bank of U. S. v. Smith*, 11 Wheat. 171; *Shutts v. Fingar*, 100 N. Y. 539.

Demand by letter is insufficient to charge the indorser. The obligation to make a demand, implies an opportunity afforded for performance, and there must be a person present to receive payment.

Hartford Bank v. Green, 11 Iowa 476; *Dan. Neg. Int. Sec.* 518; *Pierce v. Whitney*, 29 Me. 188; *Lockwood v. Crawford*, 18 Conn. 361.

Reasonable Time.—The note should be presented for payment if not immediately at least within a very short time and that the delay was such as to dishonor the note and release the indorser.

Crim v. Starkweather, 88 N. Y. 339.

A check drawn on Saturday and negotiated the following Monday was not overdue.

Asbury v. Taube, 151 Ky. 142.

Where the holder omits to make a demand until the liability of the maker has been discharged by the running of the Statute of Limitations, the indorser is thereby discharged.

Shutts v. Finger, 100 N. Y. 539; Dan. Neg. Int. Sec. 1306-7.

As between the drawer and payee the rule is that, when the payee to whom the check is delivered receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day.

2 Dan. Neg. Inst. (5 ed) Sec. 1590; Matlock v. Scheuerman, 51 Or. 55; 93 Pac. Rep. 823.

A demand note transferred by payee eighteen months after its date, upon which continuous payments of monthly interest have been made to payee, is not overdue at time of transfer.

McLean v. Bryer, 24 R. I. 599; 83 N. E. 861.

What constitutes reasonable time will vary under the facts and circumstances of different cases, and this section expresses as definite rule as could well be established or considered desirable, and where a party obtained a cashier's check from a bank in North Carolina and negotiated the same to a party residing in Virginia in five days thereafter, such negotiation was within a reasonable time.

Manufacturing Co. v. Summers, 143 N. C. 103; Merritt v. Todd, 23 N. Y. 31; Hussey v. Sutton, 160 N. Y. Supp. 934.

§ 93. Notice before full amount paid. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

This is declaratory of the law, see Dan. Neg. Inst. Sec. 798a; Weaver v. Borden, 49 N. Y. 286; Albany County Bank v. Peoples' Ice Co., 92 App. Div. (N. Y.) 48; Bank of Morehead v. Hernig, 220 Pa. 224.

If a purchaser of a note for value before maturity has notice of facts tending to show defenses to the same, he cannot purposely refrain from making inquiries as to the inception of the paper, and at the same time claim to be a *bona fide* purchaser.

Walters v. Rock, (N. D.) 115 N. W. Rep. 512; see also, Bank of Morehead v. Hernig, 220 Pa. 224.

The plaintiff discounted three notes paying therefore one-half of their face value, under an agreement that he was to retain the other half as security until the notes were paid. In an action against the maker

of one of the notes it was held that he was entitled to recover one-half of its face value notwithstanding the fraud of the party who indorsed the notes to him.

Rosenbaum v. Roth, 150 N. Y. Supp. 396.

\$ 1000.00	New York, May 20, 1902
Five months	after date we promise to pay to
the order of Edward Mc- Gowan	
One thousand	Dollars
at Union Square Bank	
Value received with interest	
For	The Peoples Ice Co.
Time	E. Mc- Gowan, Pres. S. C. Blakey, Treas.

The Union Square Bank, which discounted the foregoing note in due course of business for the payee thereof before maturity and placed the proceeds of the discount to the credit of the payee and retained the same until it obtained knowledge that there was an entire failure of consideration for the note as between the maker and the payee, could not, after bringing an action against the maker and payee to recover on the note, pay the proceeds of the discount to the payee and retain the right to insist that it is a holder for value and is protected from any defense existing between the maker and payee.

A deposit by a bank of the proceeds of a note to the account of a customer is not of itself a payment for the note. It is simply a promise by the bank to pay such proceeds to the customer by honoring his checks or drafts in the ordinary way pursued by banking institutions. The bank does not by such transaction transfer the title to any particular money to its customer. The bank becomes a debtor to the customer to the amount of such credit.

Albany Co. Bank v. Peoples' Ice Co., 92 App. Div. 52.

It is said by the Supreme Court of the United States in New York County National Bank v. Massey (192 U. S. 138, 145), "It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character.

(*Bank of the Republic v. Millard*, 10 Wall. 152). Or, as defined by Mr. Justice White in the case of *Davis v. Elmira Savings Bank* (161 U. S. 275, 288): "The deposit of money by a customer with his banker is one of loan with the superadded obligation that the money is to be paid when demanded by a check." (*Scammon v. Kimball*, 92 U. S. 362.)"

See also, *Aetna Bank v. National Bank*, 46 N. Y. 82; *Am. and Eng. Ency. of Law*, Vol. 4, 298; *Thompson v. Sioux Falls Bank*, 150 U. S. 231.

§ 94. When title defective. The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Variant.—The Wisconsin statute adds at the end of the section the following, "and the title of such person is absolutely void when such instrument or signature was procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

"Defective title" does not include a failure of consideration.

Hill v. Dillon, 176 Mo. App. 205, 161 S. W. 881.

Where defendant signed a note without taking the precaution to ascertain its terms, he is not entitled to a cancellation on the ground of mistake because the terms were not as he thought they should be.

Avery v. Powell, 174 Mo. App. 628; 161 S. W. 335; *Oshea v. Lehr*, 165 S. W. 837.

The first clause was considered and interpreted in *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192. It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the party so defrauded be relieved from liability thereon, then such fraud makes such paper voidable by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that when several persons assume such an obligation, it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if through fraud of the person holding it, such equality of burden is disturbed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it.

Where the evidence given upon the trial of an action upon a check tends to show that the holder had knowledge that the check was originally delivered upon a condition which had not been fulfilled, the question of good faith should be left to the jury.

Groh's Sons Co. v. Schneider, 34 Misc. 196.

Where a person was induced to sign a paper containing a blank form of a promissory note, under a false statement as to its character, the note was fraudulent, and only a bona fide holder can recover on the detached note.

Bank v. Claypool, 91 Kans. 248; Clothier v. Adriance, 531; but see, Johnson Bank v. Komhauser, 174 App. Div. 136, note Sec. 91, Subd. 4.

Whatever difference of opinion may exist as to the case of a note diverted or fraudulently put in circulation, it must be regarded as settled that the indorsee of a negotiable note made for the accommodation of the indorser, but without restriction as to its use, taking the note in good faith as collateral security for an antecedent debt and without other consideration, is entitled to the position of a holder for value.

Grouss' Bank v. Penfield, 69 N. Y. 505.

A transferee of negotiable paper who takes it knowing that it was executed by an accommodation maker and transferred in violation of conditions imposed by such maker, cannot maintain an action thereon against him.

Benjamin v. Rogers, 126 N. Y. 60; Kennedy v. Spieka, 72 Misc. 89.

Bad faith in taking commercial paper does not necessarily involve furtive motives.

Ward v. City Trust Co., 192 N. Y. 73.

The plaintiff was induced by fraud to purchase stock for which he paid by check on defendant bank. The seller deposited the check to his account in the defendant bank and later drew part of the funds and had the bank certify the check for the remainder. Thereafter, without rescinding the contract or offering to return the stock, the plaintiff notified the bank not to honor the seller's check. It was held that the bank was not bound to heed the notice, since in refusing to honor it, it would subject itself to an action for damages.

Barnard v. First National Bank of Newpoint, 111 N. E. 451; Adam, etc. v. Stewart, 157 Ind. 678; Tonner v. Smith, 31 Neb. 107, 47 N.W. 632.

Duress.—A threat by a husband to abandon his wife unless she signs certain notes, does not constitute duress, such as will relieve her of liability on the notes to a holder with notice, where it does not appear that the wife was under a reasonable apprehension that the husband would carry out his threat.

Dorsey v. Bryans, Ga., 84 S. E. Rep. 467.

Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment, do not constitute legal duress to avoid a contract; the threats must be made under such circumstances that they excite fear of imminent and immediate imprisonment.

Sulzner v. Cappeau Co., 234 Pa. 162; Cornwall v. Anderson, 85 Wash. 378; Galusha v. Sherman, 105 Wis. 263; Kaus v. Gracey, 162 Iowa 671; McCarthy v. Taniska, 80 Atl. (Conn.) 84; Wilbur v. Blanchard, 126 Pac. (Idaho) 1,069.

Where the maker of the note is prevented from exercising his free will by reason of payee's threats, the maker may repudiate the note for duress whether the threat be sufficient or insufficient to overcome mind of man of ordinary courage. In an action on a note, defended on the ground of duress, evidence as to the maker's mental or physical health, his condition in life, his experience, education and intelligence is admissible.

Cornwall v. Anderson, 148 Pac. 1.

In an action upon a check given by defendant to pay for repairs to his automobile, where plaintiffs by unlawfully withholding possession of the machine compelled the giving of a check for a larger amount than that which was really due, their good faith in enforcing a claim, in fact improper, will not affect defendant's right to set up duress as a defense.

Caldwell v. Auto Co., 158 S. W. 1,030.

Threats which induced the execution of a note by old and feeble persons amount to duress, even though they would not influence ordinary persons.

Anthony v. Brown, 214 Mass. 439; 101 N. E. 1,056.

Where upon the threatened insolvency of a firm, two of the creditors and their attorney went to the home of the aged parents of one of the members of the firm, and by indirect threats to prosecute their son, induced them to sign a note for his indebtedness, such note was void, as provided by duress.

Spoerer v. Wehland, 100 At. Rep. 287; Harris v. Carmody, 131 Mass. 51; Mack v. Prang, 79 N. W. (Wis.) 770; 45 L. R. A. 407; Adams v. National Bank, 116 N. Y. 606; Bentley v. Robson, 76 N. W. (Mich.) 691; Ortt v. Schwartz, 62 Pa. Super Ct. 70.

Fraud.—False representation made to the maker as to the consideration does not constitute such fraud as will invalidate the note. The fraud must relate to the execution and not to the consideration on which it is based.

Kellogg v. Hale, 190 Ill. App. 15; but see, Johnson Bank v. Kornhauser, 174 App. Div. (N. Y.) 135. (Note Sec. 91, Subd. 4.)

Where one unable to read signs a note without calling upon those present for assistance, he cannot question it on the theory that his signature was obtained through fraud. .

National Bank v. Hall, 151 N. W. (Ia.) 120.

Where the maker of a note voidable because of his intoxication affirms it when sober, or fails to disaffirm it within a reasonable time, it is binding.

Matz v. Martin, 149 N. W. (Minn.) 370.

A note to which the maker's signature is procured by false representation as to the character of the paper, he being ignorant of its true character, and having no intention to sign such a paper and being guilty of no negligence in doing so, is regarded by some authorities as void, even in the hands of a bona fide holder.

Greenfield Bank v. Stowell, 123 Mass. 196; Biddeford Bank v. Hill, 102 Me. 346; 66 Atl. 721; Keller v. Ruppold, 115 Wis. 636; 95 Am. St. Rep. 974; Yakima Bank v. McAllister, 37 Wash. 566; Johnson Co. Bank v. Kornhauser, 174 App. Div. (N. Y.) 136.

A note signed by one so intoxicated as to wholly destroy the rational faculties of the mind is void as between the parties.

Green v. Gunston, 142 N. W. 261; 46 L. R. A. 212.

Parol evidence is admissible to prove that a contract was procured by fraud (Barrie v. Miller, 104 Ga. 312; Dowager v. Gibson, 5 Am. St. Rep. (Iowa) 697); and parol evidence is admissible for the purpose of proving that a release was signed without knowledge of the contents, and without any intention on the part of the signer to execute an instrument of that character (Lors v. Accident Assn., 89 Wis. 19, 46 Am. St. Rep. 815). But as a general rule, unless fraud or mistake is shown, a contract in writing is conclusively presumed to contain the entire agreement in which all previous negotiations respecting the subject matter have been merged.

Smith v. Vose, 194 Mass. 193; Harris v. Murphy, 56 Am. St. Rep. 659.

Burden of Proof.—Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must before he is entitled to recover thereon, show that he is a *bona fide* purchaser, or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased it before maturity and paid value, he must show that he had no knowledge or notice of the fraud.

Vosburgh v. Diefendorf, 119 N. Y. 357; First National Bank of C. v. Green, 43 N. Y. 298; Farmers' and Citizens' National Bank v. Noxon, 45 N. Y. 762; Ocean National Bank of N. Y. City v. Carll, 55 N. Y. 440; Wilson v. Rocke, 58 N. Y. 643; Nickerson v. Ruger, 76 N. Y.

279; Canajoharie National Bank v. Diefendorf, 123 N. Y. 247; Grant v. Walsh, 145 N. Y. 502; German-American Bank v. Cunningham, 97 App. Div. 246; U. N. Bank v. Diefendorf, 123 N. Y. 203; Joy v. Diefendorf, 130 N. Y. 6; Johnson Co. Saving Bank v. Walker, 79 Conn. 348; Keegan v. Rock, 128 Ia. 39; Hodge v. Smith, 130 Wis. 326; First National Bank v. Wise, 172 Iowa 25.

Knowledge that a note was given in consideration of an executory agreement of the payee which has not been performed, will not deprive an indorsee of the character of a *bona fide* holder, unless he also has notice of the breach of the agreement.

McNight v. Parsons, 136 Ia. 390.

The *bona fide* holder for value, who receives the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, and those founded in positive statutory prohibition. The law extends this protection to negotiable instruments because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having a bill or note passed to him impeached for some covert defect. There is, however, one exception—that when a statute declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it.

Dan. Neg. Inst. Sec. 197; Alexander v. Hazelrigg, 123 Ky. 684; Sondeheim v. Gilbert, 117 Ind. 71; 18 N. E. 687; Wirt v. Stubbefield, 17 App. (D. C.) 283; but see, Johnson Co. Savings Bank v. Kornhauser, 174 App. Div. (N. Y.); note Section 91, Subd. 4.

On section generally, see, Am. Ex. National Bank of N. Y. v. N. Y. Belting Co., 148 N. Y. 698; Damelman v. Brazier, 198 Mass. 459; First National Bank of Durand v. Shaw, 157 Mich. 194; Real Estate Inv. Co. v. Russell, 148 Pa. 496; People's State Bank v. Miller (Mich.) 152 N. W. 257; Hynes v. Plastins, 45 Wash. 190; Merchants National Bank v. Branson, 165 N. C. 348; Vosburg v. Diefendorf, 119 N. Y. 357.

§ 95. What constitutes notice of defect. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

The purpose of the statute was to place commercial paper on such footing that it would be fully and freely accepted without question in commercial transactions and thereby facilitate trade, and with that pur-

pose in view to protect the holder for value before maturity from any defenses that might exist between the payor and payee, unless the holder before negotiation had knowledge of such defense or infirmity or was in possession of such facts as would make his negotiation of the paper amount to bad faith.

In some of the states it seems to have been held that one who takes a transfer of negotiable paper under circumstances to put a reasonable person on inquiry as to defenses against it, is considered as having notice of the facts which such inquiry would develop; but the more general trend of the decisions from an early day has been to the effect that mere ground of suspicion as to possible defects in the title of the negotiator or of the existence of defenses to the instrument negotiated is not the equivalent of notice to the transferee, and, to be regarded as an innocent purchaser, he need not as a matter of law be diligent to investigate the circumstances of the origin of the paper, though if the negligence be of a marked or gross character it may be competent to establish the *mala fides* of the purchaser. That which will charge the paper in his hands with prior equities and defenses, is actual or direct notice of the facts. Or, in the absence of such notice or knowledge, the existence to his notice of such facts or circumstances that his action in taking the paper amounts to bad faith.

Mere suspicious circumstances are not sufficient to put a party upon inquiry, unless the circumstances are such as to so strongly intimate a defect in the title that a deduction of bad faith may fairly be made. Gross carelessness, although not of itself sufficient as a matter of law, to defeat the title in a purchaser for value, constitutes evidence of bad faith.

Canajoharie National Bank v. Diefendorf, 123 N. Y. 191; Am. Ex. National Bank v. N. Y. Belting Co., 148 N. Y. 698; Interboro Brewing Co., v. Doyle, 165 App. Div. (N. Y.) 650; Hibbs v. Brown, 190 N. Y. 167; Baruch v. Buckley, 167 App. Div. (N. Y.) 116; Cole v. Harrison, 167 App. Div. (N. Y.) 336; Oliner v. Goldenberg, 168 App. Div. (N. Y.) 847; Hartford National Bank v. Gardner, 157 N. Y. Supp. 849; Ward v. City Trust Co., 192 N. Y. 61; Eisenberg v. Lefkowitz, 142 App. Div. (N. Y.) 569; Van Slyke v. Rooks, 181 Mich. 88.

No other rule than cited above would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act with safety.

Chemical National Bank v. Kellogg, 183 N. Y. 96; Mass. National Bank v. Snow, 187 Mass. 159; Second National Bank v. Morgan, 165 Pa. 199; Goetting v. Day, 87 N. Y. Supp. 510; Cole v. Harrison, 153 N. Y. Supp. 200; Cheever v. Pittsburgh Ry. Co., 150 N. Y. 59.

The title of one who for full value receives a transfer of negotiable paper before maturity and without notice of any outstanding or antecedent equities, is not subject to be defeated by proof that he might have obtained such notice by the exercise of active vigilance.

State Bank of Ohio v. Hoge, 35 N. Y. 65; Strickland v. N. Y. C. & H. R. R. Co., 88 App. Div. (N. Y.) 367; Arnd v. Aylesworth, 145 Iowa 185; Setzer v. Deal, 135 N. C. 428; Bank v. N. Y. Belting Co., 148 N. Y. 705; Jarvis v. Manhattan Beach Co., 148 N. Y. 652; Davis v. Clark, 85 N. J. L. 696; Rice v. Barrington, 75 N. J. L. 806.

He has a right to assume that the relations to the paper of every party whose name appears on it are precisely what they appear to be.

Cheever v. Pittsburgh, etc. R. R., 150 N. Y. 59; Valley Savings Bank v. Mercer, 97 Md. 459; Massachusetts National Bank v. Snow, 187 Mass. 163; Bank v. Butler, 113 Tenn. 575; Goodman v. Simmons, 61 U. S. 343.

It is now a well settled rule that the rights of a holder of a negotiable instrument is to be determined by the simple test of honesty and good faith, and not by speculative issue as to his diligence and negligence.

Charters v. Palmer, 113 App. Div. (N. Y.) 108; Second National Bank v. Weston, 172 N. Y. 250; Manhattan Savings Inst. v. N. Y. National Exch. Bank, 170 N. Y. 58; Weissinger v. Van Buren (Ky.) 123 S. W. 289; Second National Bank of Clarion v. Morgan, 165 Pa. St. 199.

But it is a settled rule that when the maker of negotiable paper shows that it has been obtained from him by fraud and duress, a subsequent transferee must, before entitled to recover on it, show that he is a *bona fide* holder.

Vosburgh v. Diefendorf, 119 N. Y. 364.

Where the taint of fraud once attaches to a written contract, negotiable or otherwise, the law is careful to require every person who seeks to profit by it to show that he comes into court with clean hands. It would be a departure from principle to hold that the maker must prove that the holder had notice of the fraud. Whether he had notice or not is a matter peculiar within his own knowledge.

Giberson v. Jolley, 120 Ind. 301; (22 N. E. 306).

The purchaser of a note is a holder in due course, though he only pays for it one-third of its face value, the inadequacy of price standing alone not being sufficient to put him on notice, both the purchaser and seller living in another state and neither knowing the maker of the note.

Ham v. Merritt, 150 Ky. 11; 4 Am. and Eng. Ency. 283.

An indorsee of a negotiable instrument is not deprived of the position as holder in due course by the fact, and that alone, that said indorsement is in form "without recourse."

Bank of Sampson v. Hatcher, 154 N. C. 359; *Siegel v. Bank*, 131 Ill. 569; *Ferriss v. Tarbel*, 87 Tenn. 386; *Stevenson v. O'Neil*, 71 Ill. 314; *Kelley v. Whitney*, 45 Wis. 110; *Thorpe v. Mindeman*, 123 Wis. 149; *Brotherton v. Street*, 124 Ind. 599.

Money held in fiduciary capacity.—A supervisor of the plaintiff town opened an account in the defendant bank entitled, "H. C. Merritt, Supervisor," in which were deposited town funds. The supervisor drew checks against the account payable to his own order and wrongfully appropriated the money to his own use. It was held that the bank was not called upon to investigate the purpose of the supervisor in withdrawing the money on checks payable to his own order, and that it was not liable to the town for the supervisor's defalcations. It was held that the fact that the supervisor drew 57 checks against the account to his own order did not put the bank upon notice that he intended to abuse his trust and apply the money to his individual use.

Town of Eastchester v. Mt. Vernon Trust Co., 159 N. Y. Supp. 289.

In the above case the subject was treated by Justice Thomas. The importance warrants the following extended extract from the opinion:

"The relation between the defendant and Merritt was that of debtor and creditor. The opening of the account in the name of "Merritt, Supervisor," distinguished it from personal account only in that it informed the bank that the moneys did not belong to Merritt as an individual, but that he had them in trust. (*National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693.) In this instance the word "Supervisor" indicated the depositor's official relation, and therefore the nature of the trust; while, if the deposit of the moneys had been by "Merritt, Trustee," the trust itself would have been wholly undefined, and the depository would have known only that it did or might exist.

But, in either case, the bank was not obliged, for the purposes of payment, to search for his authority as trustee. (*Manhattan Savings Institution v. N. Y. National Exchange Bank*, 170 N. Y. 58, 67, 62 N. E. 1,079, 88 Am. St. Rep. 640; *Boone v. Citizens' Savings Bank*, 84 N. Y., 83, 86, 38 Am. Rep. 498.) The relation of the parties is clear. Merritt, supervisor, had deposited moneys which he officially held. Then the defendant owed him the money, and could and should pay it only to him. (*Perley v. County of Muskegon*, 32 Mich. 132, 136, 20 Am. Rep. 637; *Pittsburgh v. First National Bank*, 230 Pa. 176, 181, 182, 79 Atl. 406.) If it did not pay upon proper demand, it was subject to action (*Citizens' National Bank v. Importers' and Traders' Bank*, 119 N. Y. 195, 23 N. E. 540), and could not plead in defense an interest in the town (*Swartwout v. Mechanics' Bank of New York*, 5 Denio 555).

When a check in the form justified by the contract between the parties is presented by a depositor of trust money, the debtor owes no duty in behalf of the beneficiary to scrutinize the demand, or to be circumspect, lest its customer is betraying his trust. (*Goodwin v. American National Bank*, 48 Conn. 550, 567.) Its solicitude should be to pay the debt to or upon the proper order of the person to whom it is owing, but not to suspect its customer's integrity or to guard against his doing wrong. (*Lowndes v. City National Bank*, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; *Duckett v. Mechanics' Bank*, 86 Md. 400, 405, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.) The duty of a bank touching a trust fund and its duty to be apprehensive for the conduct of its depositor is discussed in *Eyrich v. Capital State Bank*, 67 Miss. 60, 71-73, 6 South. 615; *Munnerlyn v. Augusta Savings Bank*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; *Brookhouse v. Union Publishing Co.*, 73 N. H. 368, 373, 62 Atl. 219, 2 L. R. A. (N. S.) 993, 111 Am. St. Rep. 623, 6 Ann. Cas. 675; *Morse on Banks and Banking*, Sec. 317. But I gather that, in the absence of knowledge to the contrary, a bank is free to accept its depositor as honest in his purposed use of the money of which by check he demands payment. *Freeholders of Essex v. Newark National Bank*, 48 N. J. Eq. 53, 21 Atl. 185; *National Bank v. Insurance Co.*, 104 U. S. 54, 63, 64, 26 L. Ed. 693.

In view of such attitude of the depository to its depositor, although a trustee, and to the trust, it cannot be said that, when Merritt, supervisor, presented a check payable to his own order, the debtor should at its peril halt its creditor, interrogate him as to his purpose, or perchance suspend payment pending investigation. In *Lowndes v. National Bank*, 82 Conn. 8, 72 Atl. 150, 22 L. R. A., 408, the court, after attaching liability to the bank for devastavit of an account of trust moneys, was painstaking to state:"

"This is not to say that a bank undertakes to supervise and safeguard a trust account therein, or comes under the duty of looking after the appropriation of such funds when withdrawn. Such is not the law."

And it decided that a check drawn on trust funds by "Layton, administrator, to Layton individually, was not irregular upon its face."

In *Havana Central R. Co. v. Central Trust Co.*, 204 Fed. 546, 123 C. C. A. 72, L. R. A. 715, the decision was that, where the treasurer of the plaintiff drew a check signed, "Havana Central Railroad Company, C. W. Van Voorhis, Treasurer," to his order as an individual, as other checks had been drawn before, the bank was authorized to pay it without questioning it. There an agent drew a check in his own favor not on an account opened by him, but against the account of his principal, and even if the Court of Appeals in an action by the same plaintiff against the

Knickerbocker Trust Company (198 N. Y. 422, 92 N. E. 12, L. R. A. 720) did suggest another view, it must be kept in mind that in the action at bar the depositor was drawing against his own account, and no question of authority from the depositor is involved.

In *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916, L. R. A. 518, one Baker drew a large number of checks to his own order against an account kept by him under the name "Estate of Albert H. Baker, Wm. L. Baker, Administrator," whereby he met overdrafts on his personal account, and later the bank carried other checks to his credit in his personal account, whereupon he withdrew and misappropriated the money. It was found that as to the first class of checks the bank was liable, as it participated in the breach of trust, but that as to the second group it was not liable. The opinion states (page 422 of 211 Mass., page 919 of 97 N. E. [L. R. A. 518]):

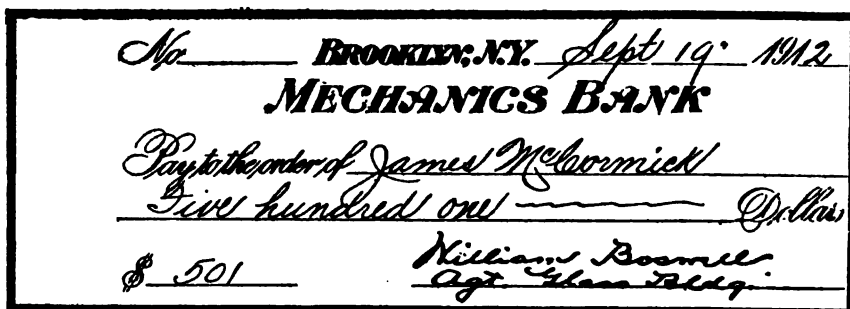
"The principle governing the defendant's liability is that a banker who knows that a fund on deposit with him is a trust fund, cannot appropriate that fund for his private benefit, or, where charged with notice of the conversion, join in assisting others to appropriate it for their private benefit, without being liable to refund the money, if the appropriation is a breach of the trust."

"From these authorities it is clear that a depositor, although holding money in a fiduciary capacity, may draw it out of the bank ad libitum. The bank is bound to honor his checks, and incurs no liability in so doing, as long as it does not participate in any misapplication of funds or breach of trust. The mere payment of the money to, or upon the checks of, the depositor, does not constitute a participation in an actual or intended misappropriation by the fiduciary, although his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Such circumstances do not impose upon the bank the duty, or give it the right, to institute an inquiry into the conduct of its customer, in order to protect those for whom it may hold the fund, but between whom and the bank there is no privity."

97 Tex. 576, 80 S. W. 606, 65 L. R. A. 820, 104 Am. St. Rep. 885.

The addition of the word "Trustee" to the name of a person is notice of a trust and calls for inquiry and examination, and a person taking an assignment of a note made payable to the order of a third person as trustee is put upon inquiry as to all the terms and conditions under which the note was executed and is presumed to have full knowledge thereof.

Geyser v. Stark, 106 Fed. 558; 53 L. R. A. 684; *Marbury v. Ehlen*, 72 Md. 206; *McLeod v. Despain*, 46 Or. 526; *Henshaw v. Bank*, 239 Ill. 515; 88 N. E. 214.



Boswell, as the agent of plaintiffs, had charge of certain premises known as "Glass Buildings"; he deposited the rents collected to the credit of a bank account kept in his name as "Agent Glass Buildings." In payment of a debt which Boswell owed defendant, as collateral for which the latter held certain securities, he received a check on the bank signed by Boswell, with the words "Agt. Glass Buildings" following his signature, and on receipt surrendered the securities. The check was paid by the bank and charged to said account. Boswell had no authority to so use the fund. In an action to recover the amount thereof, there was no evidence tending to raise any question as to defendant's good faith, except such receipt of the check. Held, that the form of the check was sufficient to indicate to defendant the existence of an agency, and to put him on inquiry as to the agent's authority to so use the money.

Gerard v. McCormick, 130 N. Y. 261; see also, Carpenter v. Farnsworth, 106 Mass. 561; N. Bank v. Ins. Co., 104 U. S. 517; Shaw v. Spencer, 100 Mass. 389.

A guardian who kept funds in defendant's bank in his name as guardian, also had an individual account in the same bank. He closed out the individual account, and later drew checks signed in his individual name, which the bank paid out of the guardianship account. Held that the bank was liable for the amount thus paid.

United States Fidelity Co. v. U. S. National Bank (Or.) 157 Pac. Rep. 155.

The guardian might have negotiated the original check drawn in his favor for the amount due his ward, and deposited the proceeds to his private credit in the bank cashing it or in any other institution of the kind, and the depository, having no further knowledge, would be protected in paying the checks drawn against the deposit and signed in the personal name of the individual, even though he had also the office of guardian. This is upon the principle that the bank is bound to respond to the checks of the party with whom it contracts acting in the character in which he stipulates.

Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333; 14 S. E. 554; *Coleman v. First National Bank*, 94 Texas 605; 63 S. W. 867; *Safe Deposit and Trust Co. v. Diamond National Bank*, 194 Pa. 334; *Batchelder v. Central National Bank*, 188 Mass. 25; 73 N. E. 1024; *Hood v. Kensington National Bank*, 230 Pa. 508; 79 Atl. 714; *National Bank v. Insurance Co.*, 104 U. S. 54, 64.

Where an executor deposits the funds of the estate in one bank, and draws checks as executor on such deposit and deposited the checks to his individual account in another bank, and out of the individual account paid notes due by him to the second bank, the second bank is liable to the estate in the amount so appropriated. Being put on notice the bank was held a party to the misappropriation.

Bischoff v. Yorkville Bank, 218 N. Y. 106; see also notes in L. R. A. 1915 C, 518; L. R. A. 1515 A, 715.

Where a fiduciary draws a check to his individual order and deposits it elsewhere in his individual account, and subsequently uses the proceeds in breach of his trust, the bank receiving such deposit is not liable for the proceeds, in the absence of actual knowledge of the fiduciary's misconduct or of circumstances sufficient to put it on inquiry.

Havana R. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 423; *Mills v. Nassau Bank*, 52 Misc. 342; *Batchelder v. Central Bank*, 188 Mass. 25; *Goodwin v. American National Bank*, 48 Conn. 550; *S. and D. Trust Co. v. Diamond*, 194 Pa. St. 334; *Rhinehart v. Banking Co.*, 99 Mo. App. 381; *Martin v. Kansas National Bank*, 66 Kan. 563.

Where a check, given in payment of an individual debt, is signed by the debtor and another as executor of the estate, the form of the check is notice to the payee that it is payable from trust funds and the collection of the check renders him a joint tort frasor with the drawers in the conversion of the amount of the check from the trust fund.

Squire v. Ordemann, 194 N. Y. 394; and cases cited.

\$ 360.00	Denver, Colo. June 1, 1916
After months	after date I promise to pay to
the order of John Atkin	
Three hundred sixty no 100	Dollars
at 302 Dover Bldg. Denver, Colo.	
Value received with interest	Charles Knapp Esq.
No. _____	of Estate of John Ray

Greatest caution should be exercised in discounting or accepting a note of an executor, administrator, guardian or trustee. Unless expressly given authority none of them have power to bind the estate represented by them. The title of the property coming into their hands vests in them only for the purpose of administration. Such a person who makes, indorses or accepts negotiable paper is personally liable thereon, although he adds to his signature the title of his office. The foregoing signature, regardless of the authority of Knapp to bind the estate, is incorrect; the words, "Executor of Estate of John Ray" are merely descriptive and are no more binding on the estate than if it were signed, Clarence Knapp, Republican, or any other descriptive word. While the note would in no way bind the estate of John Ray, Clarence Knapp would be personally liable to Thomas Atkin for the amount thereof. Had Knapp the authority to execute paper the signature to bind the estate would be "Estate of John Ray, By Clarence Knapp, Executor."

Schmittler v. Simon, 101 N. Y. 554; Connor v. Clark, 12 Cal. 168; Foster v. Fuller, 6 Mass. 758.

\$ 1100	Baltimore Md July 8 1916
Twelve months after date we promise to pay to	
the order of N. W. Watkins, Trustee	
Eleven hundred and no/100	Dollars
at First Nat. Bank	
Value received with interest	
For	By <i>J. Register & Son</i>

(INDORSED)

N. W. WATKINS, TRUSTEE,
J. REGISTER & SON.

This note was given for the purchase of property sold by Watkins as trustee under a decree of the court. The note was indorsed by Register and Son. Subsequently, Watkins wrote above the name "J. Register and Son" the indorsement "N. W. Watkins, Trustee." Watkins thereafter sold the note through a broker to the Third National Bank, and the proceeds appropriated by Watkins. In a suit on the note the court said, "It cannot be read understandingly without seeing upon its face that it is connected with a trust and part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the rights of the trustee to dispose of it. But this it wholly failed to do, and as it turns

out, he was disposing of the note in fraud of his trust and the bank must suffer the consequences of the risk it assumed."

Third National Bank v. Lange, 51 Md. 144; Shaw v. Spencer, 100 Mass. 382.

The same rule would apply to an executor, administrator or guardian.

Kepler v. Hall, 64 N. C. 60; Wilson v. Becker, 52 Ill. 346; Thompson v. Brown, 43 Ind. 206.

Corporation paper.—It seems the general rule that one who receives from an officer of a corporation its notes or securities in payment of or as security for a personal debt of the officer, does so at his peril. *Prima facie* the act is unlawful and unless actually authorized, the purchaser will be deemed to have taken them with knowledge of the rights of the corporation.

Wilson v. Metropolitan Ry. Co., 120 N. Y. 145; Smith v. Weston, 159 N. Y. 200; Cohnfeld v. Tannenbaum, 176 N. Y.; Black v. Bank of Westchester, 96 Md. 403; Dan. Neg. Int. Sec. 395; Kipp v. Smith, 137 Wis. 234; Park Hotel Co. v. Fourth National Bank, 86 Fed. 742; West St. L. Bank v. Shawnee Bank, 95 U. S. 557; Henderson v. Koenig, 192 Mo. 709; Reynolds v. Gerdelman, 170 S. W. 1153.

A corporation having either an express or implied power to issue negotiable paper is presumed to act within the scope of such power, and hence there is a presumption in favor of the validity of negotiable paper issued pursuant to such power.

Cox v. North Brew. Co., 245 Pa. St. 418; Bird v. Daggert, 97 Mass. 494; Jefferson Bank v. Chapman, 122 Tenn. 415.

Where the president of a corporation procured a check payable to its order, and having indorsed it in the corporate name by himself as president, and delivered it to the bank in payment of a personal loan, the form of the check was notice to the bank that such president was using the property of the corporation to pay a personal debt of himself in apparent violation of its rights.

Ward v. City Trust Co., 192 N. Y. 61; R. and C. Turnpike Co. v. Paviour, 164 N. Y. 281; Gerard v. McCormick, 130 N. Y. 264; National Park Bank v. G. A. M. W. and Co., 116 N. Y. 1281; Hathaway v. County of Delaware, 185 N. Y. 368; Newman v. Newman, 160 App. Div. 331.

As to where a corporation officer draws a corporation check in his own favor and deposits same in a different bank than on which it was drawn, see, Havana C. R. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422.

LOUISVILLE, Ky. July 2 1917

THE LOUISVILLE TRUST COMPANY
JUL 21 1917

PAID TO THE ORDER OF Lake Ontario Water Co. \$ 2550.00

Twenty five hundred and fifty and 00/100 DOLLARS

Leo Pierce

(INDORSED)

LAKE ONTARIO WATER CO.
By J. C. CLARK, TREASURER,
J. C. CLARK.

In the above illustration Leo Pierce gave his check to the Lake Ontario Water Company, a corporation. The check was indorsed in proper form by the corporation, and further indorsed by J. C. Clark in his individual capacity, who deposited the amount to his personal account. At the time of the transaction Clark as treasurer of the corporation had been authorized by a resolution of its board of directors "to take charge of all the business and property of the company, and to make and sign all checks, notes and other obligations of the corporation." There was no other resolution or by-law authorizing the use of its money or assets to pay other than corporate obligations. The bank in crediting this check to the personal account of Clark became liable to the Lake Ontario Water Company for the full amount. The form of the check was notice to the bank that Clark was using the property of the corporation of which he was treasurer for his personal use in apparent violation of his rights.

Ward v. City Trust Co., 192 N. Y. 63; Rochester and C. T. Co. v. Pavior, 164 N. Y. 281; Gerard v. McCormick, 130 N. Y. 261; Hathaway v. County of Delaware; Matter of Haas Co., 131 Fed. Rep. 232; Matter of Mills, 126 Fed. Rep. 1011; Rankin v. C. National Bank, 188 U. S. 557; S. G. T. R. Co. v. Craver, 45 Penn. St. 386.

The bank was required as a matter of law to make inquiry as to the right of Clark appropriating the check to his use, and inquiry from Clark himself would not justify the bank, whose first inquiry would be to have called for a resolution of the board of directors authorizing such use of the check. But such dangerous power cannot be conferred unless the intention is expressed in utmost clearness, and if such power is intended to be given it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of

reason that an agent should be intrusted with power to act for his principal and for himself at the same time.

Bank of New York v. National Banking Assn., 143 N. Y. 559, 564; National Trust Co. v. Miller, 33 N. J. 155; Germania Trust Co. v. Boynton, 71 Fed. Rep. 797.

In view of the decisions of the courts and the enormous losses sustained, some banks, for their protection and to guard against mistakes of their clerks, require the adoption of a resolution by the board of directors of a corporation with whom they have accounts in the form as follows:

FORM OF RESOLUTION OF CORPORATION IN OPENING BANK ACCOUNT

To the.....*Bank*
of.....

We hereby CERTIFY that the following is a true and correct copy of a Resolution duly adopted at a meeting of the Board of Directors of the*Company*, held at
.....on the.....
day of.....1917, a quorum then being present:

"RESOLVED: that the funds of this *Company* be deposited in.....
.....*Bank*
of....., and be subject to be withdrawn upon the check, draft, note or order of the *Company*, signed by any one of the following officers to wit:

.....*President*
.....*Vice-President*
.....*Treasurer*
.....*Secretary*

and the said *Bank* is hereby authorized to pay such checks, drafts, notes or orders, and also to receive the same for the credit of or in payment from the payee or any other holder when so signed, without inquiry as to the circumstances of their issue or the disposition of their proceeds, whether drawn to the individual order of, or tendered in payment of individual obligations of, the officers above named, or other officers of this *Company*, or otherwise."

.....
President

.....
Secretary

Dated at.....

.....1917.

(Impress with corporate seal)

The foregoing resolution should be adopted by the board of directors at a meeting with a quorum present. The legal effect of investing the management of the affairs of a corporation in its board of directors is to invest the directors with such government and management as a board and not otherwise. The separate action individually of the directors is not the action of the constituted body of men clothed with corporate powers (17 Am. & Eng. Ency. of Law, 83), and the resolution to be effective and a protection of a bank relying on it should be adopted at a regular meeting with a quorum present. A knowledge of the law will convince any reasonable person the reasonableness of a bank demanding such protection. The bank dealing with a corporation has no control of the personnel of its officers and agents, and it would seem reasonable that the stock holders of a corporation should stand the responsibility of acts of its officers and agents selected by them—and not require the bank to inquire as to their authority in every transaction, requiring time and in some cases embarrassment.

Payment of personal debts of a partner or officer of a corporation with corporation paper.

New York June 30 1917 No. _____
Broadway Trust Company (INC)
 WOOLWORTH BUILDING.

Pay to the order of Siegel Cooper Co \$ 396.00
Three hundred ninety six Dollars
 Edward Electric & Mfg. Company
John D. Sick, Treas.

It is a general rule that where one who receives from an officer of a corporation its check or note in payment of or as security for a personal debt of the officer, does so at his peril. Prima facie the act is unlawful, and unless actually authorized, the purchaser will be deemed to have taken them with knowledge of the rights of the corporation.

Wilson v. Met. Ry. Co. 120 N. Y. 145.

"It is well settled that one partner cannot give a partnership check, without the assent of the other partners, in payment of his individual

debt. *Rovers v. Betterton*, 93 Tenn. 630, 27 S. W. 1017, and authorities cited. So it has been held by the Supreme Court of the United States that one partner cannot use the partnership funds to pay his pre-existing debts without the consent, express or implied, of the other partners, and in such case a partnership creditor may recover from the party receiving the fund, although the party did not know that he had received partnership funds. *Rogers v. Batchelor*, 12 Pet. 221; *Dob v. Halsey*, 16 Johns. 34."

The effect of notice referred to in cases cited is to put the bank upon inquiry to see if it was about to accept money from one whom it did not belong in payment of his own claim, and the presumption arising from the face of the check was that it belonged to the corporation and that its officer had no right to use it to pay his personal debt.

Ward v. City Trust Co., 192 N. Y. 61; *Gerard v. McCormick*, 130 N. Y. 261; *First National Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459; *Angle v. N. W. Insurance Co.*, 92 U. S. 312.

If the president of a corporation who is authorized to make the corporation notes, makes one regular in form, attested by its secretary, payable to the order of a third person, who in fact had no interest therein, and the note is indorsed by the nominal payee to a firm of which the president is a member, or in blank and then indorsed by the firm, and the president thereafter wrongfully delivers the note, for value, before maturity, to a stranger having no actual knowledge or notice of defect in the title, the fact that the corporate note bears upon its face the signature, as president, of the party dealing with it, is not sufficient to put the transferee upon inquiry and does not deprive him as a matter of law of the character of a *bona fide* purchaser.

Cheever v. Pittsburgh R. R. Co., 159 N. Y. 60.

In *Reynolds Elevator Co. v. Merchants National Bank*, 55 App. Div. 1, a bank received checks drawn by the president of a corporation against the corporation account in payment of the president's individual debt. The bank was held liable to the corporation for the amount of the checks, the court saying in the opinion:

"It is well settled that a person who knowingly receives from an agent the money or property of a principal in payment of the agent's debt, does so at his peril; and if the agent acted without authority, the principal may, on proof of these facts, recover his money."

Manhattan Co. v. National Bank, 133 Fed. 76.

Plaintiff's president having without authority indorsed checks payable to it with its name, and thereunder with his own name, both in his handwriting, and deposited them to the credit of his individual account with defendant bank, and defendant having collected them and paid out the proceeds on the personal checks of such president, defendant became liable to plaintiff, at its election, either in conversion for the value of the checks, or for the proceeds thereof as for money had and received.

Moch v. Security Bank, 163 N. Y. Supp. 277.

In the foregoing case the court said: "The uncontroverted evidence is in accordance with the allegations of the complaint, that the checks were indorsed, so deposited to Moch's credit, collected, and the proceeds paid out without authority; and since there was no representation by the corporation concerning Moch's authority by which the bank was misled or the plaintiff is estopped from claiming ownership, no title passed, and the bank in receiving and exercising dominion over the checks by parting with them and collecting the proceeds, converted the checks and became liable to the plaintiff, at its election, either in conversion for the value of the checks or for the proceeds thereof as for money had and received, without regard to any question of good faith, or of notice or knowledge or duty of inquiry, notwithstanding the fact that it may have parted with the money in good faith and in the belief that Moch was authorized to indorse the checks and to receive the proceeds."

Robinson v. Chemical National Bank, 86 N. Y. 404; *Comstock v. Hier et al.*, 73 N. Y. 269, 29 Am. Rep. 142; *Porges v. U. S. Mortgage and Trust Co.*, 203 N. Y. 181, 96 N. E. 424; *Silver v. Krellman*, 89 App. Div. 363, 85 N. Y. Supp. 945; *Talbot v. Bank of Rochester*, 1 Hill 295; *Burstein v. People's Trust Co.*, 143 App. Div. 165, 127 N. Y. Supp. 1092; *Schmidt v. Garfield National Bank*, 64 Hun. 298, 19 N. Y. Supp. 252, affirmed in 138 N. Y. 631, 33 N. E. 1084; see also, *Gerard et al. v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; *Cobb v. Dows*, 10 N. Y. 335.

Partnership paper.—The fact that a promissory note signed by an individual, who is a member of a partnership, is made payable to his own order, and is indorsed by him first in his own name and then in the name of the firm, does not give notice to a person who takes the note for value, that the indorsement in the name of the firm was for the accommodation of the maker or that the maker is to receive the proceeds of the note for his private use.

Feigenspan v. McDonnell, 201 Mass. 342.

\$ 1000.00	St. Louis, Mo. July 7 1917
Three months	after date
the order of Moon & Clark	I promise to pay to
One thousand	Dollars
at Commercial Bank	
Value received with interest	
Wm	William S. Moon

(INDORSED)

MOON & CLARK
WILLIAM S. MOON

Where a partner makes a promissory note in his own name, payable to the order of the firm, indorses the name of the firm on the note, and requests a bank to discount the note and place the proceeds of his discount to his personal credit on the books of the bank, the bank has notice of such irregularity as imposes on it the duty of inquiry as to whether the maker had authority from the firm to indorse the note with the firm name and procure its discount for his personal use.

The fact that a firm note is given by one of the partners without the knowledge or consent of the other for goods sold to him personally is presumptive evidence of want of authority to bind the other members of the firm, and if the person taking knows the fact at the time, he is chargeable with notice of such want of authority.

Union N. & B. Co. v. Doherty, 20 Misc. 23.

The same rule applies where an agent pays a personal debt with a check signed by him as agent.

Coffin v. Tevis, 164 App. Div. (N. Y.) 323; Cox v. Northampton Brewing Co., 245 Pa. St. 418.

A bank, which permits an administrator to deposit estate funds to the credit of his personal account, is not liable to the beneficial owners of the funds, where they are misappropriated by the administrator in the absence of knowledge on the part of the bank that such misappropriation was taking place. But if the bank, with the knowledge of the trust character of the funds, applies them to the personal debt, due from the administrator to the bank, or knowingly assists or participates in the misapplication of such funds, it will be liable for the amount so misapplied.

Miami Co. Bank v. Peru Trust Co. (Ind.) 112 N. E. 40.

Also where an executor (or trustee) uses trust funds for a similar purpose.

Bischoff v. Yorkville Bank, 170 App. Div. (N. Y.) 681; *Squire v. Ordemann*, 194 N. Y. 394; 87 N. E. 435; *Cohnfeld v. Tanenbaum*, 176 N. Y. 126; 68 N. E. 141; *Ward v. City Trust Co.*, 192 N. Y. 61; 84 N. E. 585; *Union Stockyards Bank v. Gillespie*, 137 U. S. 411; *Shaw v. Spencer*, 100 Mass. 382; *Allen v. Puritan Trust Co.*, 211 Mass. 409; *Brookhouse v. Union Publishing Co.*, 73 N. H. 368; *Havana C. R. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422; *Ford v. Brown*, 114 Tenn. 467; *Swift v. Smith*, 102 U. S. 442.

The executor of an estate, who kept an account in his name as executor in another bank, drew checks thereon, payable to the order of defendant bank, which he deposited to his personal account in the defendant bank. He repaid loans made to him by the defendant with checks drawn against the account in the defendant bank, and also drew checks against such account to pay personal obligations to others. It was held that the bank was chargeable with knowledge that the executor was making an unauthorized use of the funds of the estate, and that the bank was responsible to the estate for the amount misappropriated after the time the executor used the funds to satisfy his individual debt to the bank.

Bischoff v. Yorkville Bank, 218 N. Y. 106; 112 N. E. 759.

Note of insane person.

\$ 2,000.00	Albany N.Y. June 10. 1917
Three months	After which I promise to pay to
the order of Albany County Bank	
Two thousand no/100	Dollars
at Albany County Bank.	
Value received with 6%.	
No. _____ Date _____	Henry Watkins

If at the time of the making and negotiating the foregoing note Watkins was a lunatic, whose lunacy had been judicially determined and for whom a committee had been appointed, he is incapable of entering into any contract, and any contract which he may assume to make while in that situation is absolutely void.

Hughes v. Jones, 116 N. Y. 67; *Carter v. Beckwith*, 128 N. Y. 316.

The fact that for the time being, he so deported himself as to conceal his lunacy cannot alter his rights to be protected against his own misfor-

tune, and although the bank dealing with him may be ignorant of his condition it is its misfortune and it will not be allowed to throw it upon one already helpless.

Burden of Proof.—In an action the burden of proof is on the defendant, the notes making out a *prima facie* case for the plaintiff.

Pratt v. Rounds, 160 Ky. 359.

For cases on subject generally, see, *Felebronn v. Hayward*, 190 Mass. 481; *Phillips v. Eldridge*, 221 Mass. 104; *Matlock v. Scheuerman*, 51 Or. 51; *Silverstone v. Assurance Co.*, 176 Mich. 525; *Keegan v. Rock*, 128 Ia. 39; 102 N. W. 805; *Anthony v. Association*, 162 Mass. 354; *Walters v. Rock*, (N. D.) 115 N. W. 511; *Loundes v. City National Bank*, 82 Conn. 8; *Duckett v. National Bank*, 86 Md. 403; *Ward v. City Trust Co.*, 192 N. Y. 61; *American National Bank v. Fidelity and Deposit Co.*, 129 Ga. 126; *Bishoff v. Yorkville Bank*, 170 App. Div. (N. Y.) 679; *Union Stock Yards Bank v. Gillispie*, 137 U. S. 411; *National Bank v. Insurance Co.*, 104 U. S. 54; *Roco v. Byrne*, 145 N. Y. 182; *Squire v. Ordemann*, 194 N. Y. 394; *Allen v. Puritan Trust Co.*, 211 Mass. 409; *Safe Deposit Trust Co. v. Bank*, 194 Pa. 334; *Batchelder v. Central National Bank*, 188 Mass. 25; *U. S. Fidelity Co. v. Home Savings Bank*, (W. Va.) 88 S. E. 109; *Havana C. R. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422.

§ 96. Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Variant.—The Illinois statute after the word “themselves” adds “except the defect and defense specified” in certain acts relating to fraud and gambling. The Wisconsin statute adds to the end of the section the following: “Except as provided in Sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of Sections 1676–25 of this act.”

There is a conflict of opinion among the courts of the different states as to the interpretation of this section as to paper made in violation of statute, more particularly relating to those issued for a gambling debt and those tainted with usury. Some of the courts basing their interpretation on the requirement of business and others on the moral ground.

Common Law Rule.—Prior to the enactment of the Negotiable Instrument Law, the general rule in New York was that a note void in its inception for usury continues void forever, whatever its subsequent history may be. It is void in the hands of an innocent holder for value, as it was in the hands of those who made the usurious contract. No validity can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade.

Clafflin v. Boorum, 122 N. Y. 388; *Miller v. Zimmer*, 111 N. Y. 441-4; *Eastman v. Shaw*, 65 N. Y. 522; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Sabine v. Paine*, 166 App. Div. (N. Y.) 9.

N. Y. Rule.—Since the enactment of the law, however, a different rule has been adopted in *Schlessinger v. Kelly*, 114 App. Div. (N. Y.) 554. In a concurring opinion Justice Laughlin said: "I think that the purpose of the commission in preparing the draft of the Negotiable Instrument Law and the various Legislatures in enacting it, will be thwarted if Section 96 is to receive the construction that even against a *bona fide* holder in due course for value the maker of the note may successfully defend upon the ground that in the inception of the note some local law was violated. The force and effect of the statutes against usury will not be seriously impaired by the construction which I think should be given to the Negotiable Instrument Law. The usury laws remain in full force, but to facilitate the free circulation of negotiable paper by protecting holders thereof in due course for value in their right to enforce the same, the usury laws are to that extent superseded by Section 96 of the Negotiable Instrument Law. Of course it was perfectly competent for the Legislature to do this. The only question is whether or not it so intended, and I am of the opinion that it did."

See also, *Klar v. Kostink*, 65 Misc. 199.

Promissory notes void for usury as between the original parties are nevertheless valid and enforceable when discounted by a state bank for value before maturity in due course of business without notice of their usurious inception.

Federal Bank of N. Y. v. Gilhooly, 189 N. Y. 1, and cases cited; *Schlessinger v. Kelly*, 114 App. Div. (N. Y.) 546.

National and state banks are entitled to protection in the purchase of negotiable paper in so far as the officers of such bank act in good faith, and not where they knowingly and intentionally join with the wrongdoers in an attempt to evade the laws. Where therefore, a bank discounts promissory notes which are void for usury, with full knowledge of the payment of an usurious rate of interest thereon, such usury may be

pleaded as a defense to an action on the notes, and the provisions of the Banking Law (Chap. 310, Sec. 1, Laws of 1900), modifying for the benefit of banking institutions the general statutes in relation to usury, have no application.

Federal Bank of N. Y. v. Lehmaier, 191 N. Y. 69.

The purpose of the Legislature in enacting this provision to make a radical change in the law of this state (N. Y.) affecting negotiable paper, and the law now is that a *bona fide* holder in due course holds the note free from any taint of usury.

Klaw v. Kostink, 65 Misc. (N. Y.) 201.

The question as to whether this section supersedes, as to *bona fide* holders in due course for value, local laws declaring negotiable paper tainted with usury null and void was fully discussed in 17 App. Cas. D. C. 283. In that case Alvey, Ch. J. delivering the opinion of the court in which this section was in issue said, "We know, moreover, that the great and leading object of the act has been to establish a uniform system of law to govern negotiable instruments wherever they might be circulated or negotiated. The great object sought to be accomplished was to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere to it, to the prejudice and disappointment of innocent holders as against all of the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered null and void by local statute, as against original maker or acceptor."

The payee in a note which was executed in blank and delivered to a third party, who filled it out payable to payee and delivered it to him, is not a holder in due course, and takes the instrument subject to a defense that it was not completed in accordance with the understanding of the maker and such third party.

Vander Ploeg v. Van Suuk, 135 Ia. 351.

A holder in due course under this section has the right to enforce payment for the full amount against all parties liable thereon, and a party who is sued cannot complain that others equally liable are not sued.

Choteau Trust Co. v. Smith, 153 Ky. 422.

When a note payable to bearer, which has become operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker, and all indorsers on the paper when in the hands of the loser and the loser must stand the loss.

Welch v. Sage, 47 N. Y. 143; Linick v. Nutting, 140 App. Div. (N. Y.) 268; Mass. National Bank v. Snow, 187 Mass. 160; Jefferson Bank v.

Chapman, 122 Tenn. 416; Adrian v. National Bank, 180 Mich. 180; Unaka Bank v. Butler, 113 Tenn. 574; Dan. Neg. Int. Sec. 393; Schaeffer v. Marsh, 90 Misc. 307; Moskowitz v. Deutsch, 46 Misc. 1603.

The indorsee of a negotiable accommodation note, who receives the same in good faith before maturity for value and without notice of any infirmity, is entitled in an action thereon against the maker to recover the face of the note with interest, notwithstanding such note was obtained from the maker by the fraud of the payee and indorser, and the plaintiff paid less than its face value.

Bissell v. Dickerson, 64 Conn. 61; Lassas v. McCarty, 47 Or. 475.

Usury is not a good defense against the holder in due course of a note.

Emanuel v. Misicki, 149 N. Y. Supp. 905; Oesler v. Behrend, 151 N. Y. Supp. 853; 89 Misc. 392; Crusins v. Seigman, 81 Misc. 367.

Stolen paper.—It is familiar law that one in possession of chattels by theft can convey no title to an innocent purchaser, but coin and bank bills are excepted from the rule. As to those, even if feloniously obtained, the holder can convey a good title to an innocent purchaser. To favor commerce, the law makes an exception also as to negotiable paper, and permits the *bona fide* indorser without notice to acquire title from a person who had none in himself. Where by fraud and without negligence one is induced to sign a promissory note under the representation and belief that it is a paper of another character, and delivers it to the payee, the innocent indorsee before maturity may recover of the maker.

Where the order had never been delivered, and therefore had no legal inception or existence as an order, the question is whether there is any liability upon it to an innocent indorsee for value. As is said in Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497: "The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note or property by delivery, and may transfer the title to an innocent purchaser for value. But a note *in the hands of a maker before delivery* is not property, nor the subject of ownership, as such. It is in law but a blank piece of paper." That there must be delivery of the paper, either actually or constructively, is clear. Until then it has no existence as a contract.

Bank v. Strank, 72 Ill. 559; see Section 35, Schaeffer v. Marsh, 90 Misc. 307; National Bank v. Snow, 187 Mass. 160; Jefferson Bank v. Chapman, 122 Tenn. 415; Linick v. Nutting, 140 App. Div. (N. Y.) 265; Adrian v. Central Bank, 180 Mich. 171; Salley v. Ferrill, 95 Me. 553; 55 L. R. A. 730; Branch v. Commissioners, 56 Am. Rep. (Va.) 596; Cochran v. Fox, 103 Am. Rep. (Penn.) 982; Biddeford Bank v. Hill, 102 Me. 346; Cochran v. Fox Bank, 209 Pa. 34; McNight v. Parsons, 136 Ia. 390.

It is not sufficient to show that a prudent man would have been put on inquiry.

Dutchers Ins. Co. v. Hatchfield, 73 N. Y. 226, nor will evidence of gross negligence; *Seybel v. National Currency Bank*, 54 N. Y. 288.

For cases under the section generally, see, *Williams v. Huntington*, 68 Md. 591; *Broadway Trust Co. v. Manheim*, 47 Misc. 416; *Welton v. Littlejohn*, 163 Pa. 205; *Kuhns v. Gettysburg National Bank*, 68 Pa. 445; *Real Estate Investment Co. v. Smith*, 162 Pa. 441; *Quiggle v. Herman*, 131 Wis. 379; *Arndt v. Sjoblom*, 131 Wis. 642.

§ 97. When subject to original defenses. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Variant.—The Illinois and Wisconsin statutes insert “duress” after “fraud” and substitute “such holder” for “the latter.”

The first sentence of this section must be construed in connection with other sections of the act restricting the defenses, and refers only to such defenses as are permitted by the act itself, or such as do not deny the tenor of the bill.

Bradley v. Heyburn, 56 Wash. 628.

The existence of usury in the contract between the fraudulent purchaser and his vendor, who without notice of fraud, makes advances on the property, does not affect the relative rights existing between him and the original parties.

Williams v. Tilt, 36 N. Y. 319.

The purchaser of a certified check payable to order, who obtains title without indorsement by the payee, holds it subject to all the equities and defenses existing between the original parties, although he paid full consideration without notice.

Goshen National Bank v. Bingham, 118 N. Y. 349.

While individuals who receive gifts of negotiable securities, take them subject to all equities existing at the time, they are not subject to such as may arise thereafter.

First National Bank of Champlain v. Wood, 128 N. Y. 35.

An assignee of a note secured by a mortgage, both past due at the time of the assignment, takes them subject to all the equities which any per-

son could enforce against the assignors. There is no distinction in this regard between equities existing in favor of the debtor and those in favor of a third person.

Owen v. Evans, 134 N. Y. 514; Cole v. Stearns, 20 Misc. 502.

When a maker of negotiable paper shows that it was obtained from him wrongfully, as by fraud or duress, a subsequent transferee must show that he is a *bona fide* purchaser before becoming entitled to recover upon it.

Grant v. Walsh, 145 N. Y. 502.

Where a corporation, payee of a promissory note, transferred it for full value to its president, who after having discounted it at a bank which became a holder in due course, took up the note after the failure of the maker to pay, he acquired all the rights of the bank in respect to all parties prior to the latter by virtue of this section.

Horan v. Mason, 141 App. Div. (N. Y.) 89.

Where an officer of a corporation makes a corporation obligation payable to himself, it bears upon its face sufficient notice of his incapacity to issue it, when he attempts to deal with it for his own benefit, does not apply where an officer or agent deals with a corporate note, executed by himself as such officer or agent, but originally payable to a third party, and which, so far as appears upon its face, had been regularly issued to the original payee, and by him transferred to a firm of which the officer is a member and for which he acted in dealing with the note.

Cheever v. P. S. & L. E. R. R. Co., 150 N. Y. 59; Am. Ex. National Bank v. N. Y. B. & P. Co., 148 N. Y. 698; Miller v. Consolidation Bank, 48 Pa. St. 514.

The general rule is that a person, with knowledge of facts which will defeat a promissory note in the hands of the payee, purchases it from a bona fide holder thereof, he may recover thereon upon the strength of such bona fides; but that rule does not apply to a purchaser who is payee of the note. If he sell such paper to an innocent third person and repurchase it for value, he does not thereby become possessed of any better rights as against the maker than he possessed in the first instance.

Andrews v. Robertson, 111 Wis. 334.

The general rule may be stated to be that, when a person executes a negotiable instrument fair on its face with nothing to indicate defects, possible defenses, or equities in his favor, he does so with the knowledge that it will pass current in the market, and may fall into the hands of an innocent purchaser. The maker takes the risk, and if it does so pass in the regular course of business, before maturity for value, into the hands of a person who takes it in good faith without knowledge of defects, imperfections, or defenses that may be urged against its payment, the maker is

liable to such innocent holder, no matter what defenses he might have as between himself and the original payee.

Cedar Rapids Bank v. Bashara, 39 Olka. 484; 1 *Dan'l Neg. Inst.* 775.

A check indorsed in blank by the payee and delivered in exchange for the note of another person in pursuance of an arrangement for the accommodation of the drawer of the check, deposited by the person who receives it in a bank to his credit in the ordinary course of business and immediately drawn against by him, is a negotiable instrument and subject to the law relating to such instruments, and the bank taking the check in good faith and paying full value for it is not affected by equities between the drawer of the check and the person depositing it. In such a case a stranger to the original transaction taking up the check by paying its full amount to the bank after it had been dishonored, is entitled to all the rights of the bank against the drawer.

Symonds v. Riley, 188 Mass. 470.

In the case of *Montclair v. Romsdel*, 107 U. S. 147, it was held that a holder of a negotiable instrument is presumed to have acquired it in good faith and for value. But if, in a suit upon it, the defense be such as to require him to show that value was paid, it is not in every case essential to prove that *he* paid it; for his title will be sustained if any previous holder gave value. It was there contended by the defendant that if it should be found that either fraud or illegality in the inception of the instrument was established, the verdict should be for the defendant, unless the plaintiff proved that he purchased for value or gave some consideration. But the court said: "Such was not the law; for if any previous holder was a bona fide holder for value, the plaintiff without showing that he had himself paid value, could avail himself of the position of such previous holder."

Subject generally see, *Merrick v. Alderman*, 77 Conn. 634; *Craig v. Palo Alto Farm*, 16 Idaho, 706; *Lumber Co. v. Snouffer*, 139 Iowa 178; *Bryan v. Harr*, 21 App. D.C. 190; *Cover v. Myers*, 75 Md. 406; *McMurray v. McMurray*, 258 Mo. 405; *American Seeding Mch. Co. v. Slocum*, 58 Misc. (N. Y.) 458; *Comstock v. Buckley*, 124 N. W. 414; *Kost v. Bender*, 25 Mich. 515; *Young v. Shriner*, 80 Pa. St. 463; *Marling v. FitzGerald*, 138 Wis. 101; *Bush v. Cushman*, 27 N. J. Eq. 131; *Rapp v. Gottlieb*, 142 N. Y. 164.

§ 98. Who deemed holder in due course. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the

title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

It is a well settled rule that when the maker of negotiable paper shows that it has been obtained from him by fraud or duress a subsequent transferee must, before entitled to recover on it, show that he is a *bona fide* purchaser.

Vosburgh v. Diefendorf, 119 N. Y. 357; Hartford National Bank v. Gardner, 157 N. Y. Supp. 849; Kinney v. Kruse, 28 Wis. 183; Sullivan v. Langley, 120 Mass. 437; Phillips v. Eldridge, 221 Mass. 103; Muir v. Edelen, 156 Ky. 212; Ireland v. Scharpenberg (Wash.) 103 Pac. 801; Bank of Polk v. Wood, 189 Mo. App. 62; Schultheis v. Sellers, 223 Pa. St. 517; Kost v. Bender, 25 Mich. 515; Arndt v. Heckert, 108 Md. 300; Schaeffer v. Marsh, 90 Misc. 307; Smith v. Weston, 159 N. Y. 194; Citizens National Bank v. Weston, 162 N. Y. 113; Johnson Co. Bank v. Kornhauser, 160 N. Y. Supp. 915.

The holder in due course of a note given for a gambling debt must affirmatively prove that he holds in due course as soon as it has been shown that the title of any person who negotiated the instrument was defective.

In re Hill, 187 Fed. 214.

A purchaser for value of negotiable paper after maturity is not a bona fide purchaser to the extent of being protected in his purchase against the rightful owner, from whom it had been stolen, unless he has succeeded to the rights of a bona fide purchaser before maturity. The burden is upon the purchaser in such a case to show that he is, or has succeeded to the rights of, a bona fide purchaser before maturity; there is no presumption that the thief negotiated the paper before it became overdue.

Northampton National Bank v. Kidder, 106 N. Y. 221; Hinkley v. Merchants Bank, 133 Mass. 147.

A purchaser in good faith acquires valid title to negotiate bonds payable to bearer, although they may have been stolen by the prior holder.

Welch v. Sage, 47 N. Y. 143; Seybel v. National Bank, 54 N. Y. 288; Everton v. National Bank, 66 N. Y. 14; Wylie v. Railway Co., 41 Fed. 623; Consolidated Planters v. Numa, 28 La. Ann. 552; City of Adrian v. National Bank, 180 Mich. 179.

It is apparent when this section is read in connection with all other sections in this article, that it means to place the burden upon the holder to prove that he, or some person under whom he claims, comes within the provision of the fourth clause of the statutory definition of a holder in due course—that is, that the burden is then upon him to show that at

the time the instrument was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Justice v. Stonecipher, 267 Ill. 454.

The maker of a note, sued thereon by its indorsee, proving that, when it was made, it was agreed between maker and payee that it should not be negotiated, but should be paid solely from money to become due for work to be performed, right to recover is defeated in the absence of further evidence by plaintiff.

Garone v. Russo-Iodice Realty Co., 164 N. Y. Supp. 135.

Declarations of a former owner of negotiable instrument or chose in action are not admissible against the holder or assignee to affect his title or rights.

Mukle v. Beidleman, 165 N. Y. 21; *Doge v. Freedman's Saving Co.*, 93 U. S. 379; *German-American Bank v. Stade*, 15 Misc. 287.

The payment of value for negotiable paper is circumstances to be taken into account with other facts in determining the question of bona fides of the transaction, and when full value is paid, is entitled to great weight; but that fact is not conclusive where it appears that the paper was obtained from the maker fraudulently, or under such circumstances that the original holder could not have maintained an action thereon, except in the absence of all evidence tending to show notice to, or bad faith on the part of the purchaser.

Canajoharie National Bank v. Diefendorf, 123 N. Y. 191; *King v. Doane*, 139 U. S. 166; *Bailey v. Smith*, 14 Oh. St. 396, 402.

Burden of Proof.—When the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, or that it was without consideration and fraudulently put in circulation, the holder will then be required to show under what circumstances he acquired the instrument.

First National Bank v. Green, 43 N. Y. 298; *Olean National Bank v. Carll*, 55 N. Y. 441; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 366; *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191; *McCannon v. Shantz*, 49 App. Div. (N. Y.) 460; *German-American Bank v. Cunningham*, 97 App. Div. 246; *Am. Exchange National Bank v. N. Y. Belting Co.*, 148 N. Y. 698; *Peterson v. Fowler*, 162 App. Div. (N. Y.) 23; *Interboro Brew. Co. v. Doyle*, 165 App. Div. (N. Y.) 646; *Engle v. Hyman*, 54 Misc. 253; *Lucker v. Ira*, 54 App. Div. (N. Y.) 566; *Mitchell v. Baldwin*, 88 App. Div. (N. Y.) 266; *Consolidated National Bank v. Kirkland*, 99 App. Div. 122; *International Brew. Co. v. Doyle*, 165 App. Div. 646; *Joy v. Diefendorf*, 130 N. Y. 6; *National Bank of Pittsburgh v. Hoffman*, 229 Pa. St.

429; *Bank of Morehead v. Hernig*, 220 Pa. St. 224; *National Bank of Barre v. Foley*, 54 Misc. 126; *Steinberger v. Hittleman*, 93 Misc. 105.

For cases on subject generally see, *Strickland v. N. Y. C. & H. R. R. Co.*, 88 App. Div. (N. Y.) 366; *Mills v. Sparrow*, 131 App. Div. (N. Y.) 242; *Warnock Uniform Co. v. Garifalos*, 170 App. Div. 674; *Joveshof v. Rockey*, 58 Misc. 559; *Mitchell v. Baldwin*, 88 App. Div. (N. Y.) 266; *Beck v. Maller*, 131 App. Div. (N. Y.) 243; *First National Bank v. Moore*, 148 Fed. 954; *Fuller v. Percival*, 126 Mass. 381; *Piegenspan v. McDonnell*, 201 Mass. 342; *Mayers v. McRimmon*, 140 N. C. 642.

ARTICLE 7**Liabilities of Parties**

Section 110. Liability of maker.

111. Liability of drawer.

112. Liability of acceptor.

113. When person deemed indorser.

114. Liability of irregular indorser.

115. Warranty; where negotiation by delivery or by a qualified indorsement.

116. Liability of general indorser.

117. Liability of indorser where paper negotiable by delivery.

118. Order in which indorsers are liable.

119. Liability of agent or broker.

§ 110. Liability of maker. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

The obligations of a maker and of a mere indorser of a negotiable instrument are essentially different, that of the maker being absolute while that of an indorser is contingent.

Hough v. State Bank, 61 Fla. 292.

The maker is estopped from setting up that the instrument is payable to a fictitious payee, if by such averment the instrument would be defeated.

Jones v. Home Furnishing Co., 9 App. Div. (N. Y.) 103; *Irving National Bank v. Allen*, 79 N. Y. 336.

The fact that the instrument is made payable to the maker and he is the first indorser does not change or affect the nature and character of the maker's liability. He remaining the ultimate debtor, the person who ought to pay the debt in preference to all other parties to the paper.

Delaware Co. Trust Co. v. Haser, 199 Pa. St. 17; Madison Square Bank v. Pierce, 137 N. Y. 44; Ewan v. Brooks, 55 Ohio St. 596; Hillegas v. Stevenson, 75 Mo. 118.

The general rule may be said to be, when a person executes a negotiable instrument fair on its face with nothing to indicate defects, possible defenses or equities in his favor, he does so with the knowledge that it will pass current in the market, and may fall into the hands of an innocent purchaser. The maker takes this risk; and if it does so pass in the regular course of business, before maturity for value, into the hands of a person who takes it in good faith, without knowledge of defects, imperfections, or defenses that may be urged against its payment, the maker is liable to such innocent holder, no matter what defenses he might have as between himself and the original payee.

Cedar Rapids Bank v. Boshara, 39 Okla. 484; Dan. Neg. Int., Sec. 775; Levy v. Arons, 81 Misc. 165.

In an action against the maker of a note where it appears that the note was obtained by duress, the plaintiff must show, in order to recover, that he is a holder in due course.

Phillips v. Eldridge (Mass.), 108 N. E. Rep. 909.

The fact that a note was procured by fraud is not a defense against a holder in due course.

Conqueror Trust Co. v. Reves Drug Co. (Ark.), 176 S. W. Rep. 119; Swanke v. Herdeman, 138 Wis. 654.

Want of consideration is no defense to negotiable paper in the hands of a holder in due course or in the hands of his transferee.

Douglass v. Burton (Neb.), 154 N. W. Rep. 718.

Negligence in signing the instrument, or in failing to ascertain the contents thereof will render the signer liable to a bona fide holder upon the principle of estoppel, although he may have been induced to sign it by fraud or imposition practised upon him.

4 Am. and Eng. Ency. of Law, 201; Chapman v. Rose, 56 N. Y. 137; but see Johnson Co. Bank v. Kornhauser, 174 App. Div. 136, note Sub-division 4, Section 91. See notes, Section 94 fraud.

NEW ORLEANS, June 2, 1917 No. 3672
NEW ORLEANS NATIONAL BANK 14-13
OF NEW ORLEANS
 PAY TO THE ORDER OF William A. Dake \$ 236⁰⁰
Two hundred thirty six DOLLARS
Chas. A. Bradley

(INDORSED)

**PAY TO NEW ORLEANS NATIONAL BANK
 CHARLES A. BRADLEY**

The above check was made payable to the order of William A. Dake. Charles A. Bradley being the maker by this indorsement cancelled the order upon the face of the check, and the New Orleans National Bank in the absence of certification is not liable to the payee. The check evidently never having been delivered to the payee and the bank may without risk act on the maker's indorsement.

The holder of a note with whom the indorsee had deposited the full amount thereof as security for its collection may maintain an action in his own name against the maker, and a judgment in favor of the holder would be a bar to any other suit on the same note, as payment to the holder would discharge the note.

People's National Bank v. Rice, 149 App. Div. (N. Y.) 19; Madison Square Bank v. Pierce, 137 N. Y. 414; Twelfth Ward Bank v. Brooks, 63 App. Div. (N. Y.) 220.

Where a notary procured the maker of a mortgage note to sign a new note, upon the false representation that the original note had been destroyed, the maker was liable on both notes to those who purchased them in due course from the notary.

McCowen v. Barnett (La.), 68 So. Rep. 102.

Liability on lost notes.—As to the liability of the maker on supposed lost note for which duplicates had been issued see,

Farmers' Bank v. Crawford (S. C.), 88 S. E. 13; Edens v. Gibson, 100 S. C. 353; 84 S. E. 1005.

Liability of surety signing as maker.—Surety who signs as maker is primarily liable and is not discharged by the granting of any extension to the principal maker.

Cowan v. Ramsey, 15 Ariz. 533; Union Trust Co. v. McGinty, 212 Mass. 205; Vanderford v. Farmers, etc., National Bank, 105 Md. 164; First State Bank v. Williams, 164 Ky. 143; Cellars v. Meachem, 49 Oreg. 186; Hardy v. Carter (Tex. Civ. App. 1914), 163 S. W. 1003; Wolstenholme v. Smith, 34 Utah 300; Bradley, etc., Co., v. Heyburn, 56 Wash. 628; Richards v. Market Exch. Bank Co., 81 Ohio St. 348.

An accommodation maker or surety is primarily liable and is therefore not entitled to notice of dishonor.

State Bank of Nortonville v. Williams, 164 Ky. 143.

Liability of joint makers.—When a promissory note is executed by two persons jointly and severally, the presumption is that the debt was created for their equal benefit, and the burden of proving that one of the makers signed as surety for the other is upon the party alleging it.

Brady v. Brady, 110 Md. 656; 2 Ency. of Evidence, 462; 27 Am. & Eng. Ency. of Law, 438; Richards v. Market Exch. Bank, 81 Ohio St. 348, 354; 26 L. R. A. (N. S.) 99; Hunter v. Harris, 63 Or. 505; 127 Oac. 786.

One who signs a promissory note as joint maker, although in fact signing as surety for his co-maker, is liable as a maker, although the capacity in which he signed was known to the payee. He is not discharged by extension of time granted without his consent to this co-maker.

Cleveland National Bank v. Bickel, 159 Pac. 302; United States v. Hogge, 6 How. 279; Watuga Bank v. Matson, 99 Tenn. 390.

One of two or more joint makers of a promissory note may show as against the payee what the agreement was at the time of signing it, and if any valid condition was stipulated to relieve such maker from liability.

Hover v. Magley, 116 App. Div. N. Y. 84.

\$ 347	Crystal Mich. Aug 12, 1905
Thirty days	after date we promise to pay to
the order of Western Wheel Co	
Three hundred forty seven no 100	Dollars
at Carson City Bank	
Value received being the first payment to be paid by us	
in proportion to our Road tax	
Wm. _____	John W. Shuman
Geo. _____	Richard Shuman

The foregoing note was signed by three makers and was a security for the purchase price of a road roller. The sole question arising at the trial of an action thereon was as to whether the note constituted a joint or several liability. Each of the makers thereby agreed to pay the amount due in proportion to his road tax. The plaintiff held that it is unreasonable that a business corporation should assume the determination of the amount due from each maker. The court held that there was no ambiguity on the face of the instrument and that it created a separate and not joint liability.

Western Wheel Co. v. Locklin, 100 Mich. 339.

Where a promissory note is made by several and states that "we promise to pay" it is a joint note, but where it states "I promise to pay" and is signed by two or more it is their joint and several note. Although the promise is expressed by the use of the singular pronoun "I," if the intention of all the signers to become joint and several original makers is uncontradicted by anything on the face of the note, such is the legal interpretation of such a promise signed at the same time by several, when the character and object of their signature is unexplained.

Dow Law Bank v. Godfrey, 126 Mich. 521; *Ladd v. Baker*, 26 N. H. 70; *Monson v. Brakeley*, 40 Conn. 552; 3 R. C. L. 355.

The indorsee of a promissory note cannot maintain a joint action against the ten makers of the note, when the note on its face states that the liability of each of the makers is limited to one-tenth of the amount of the note.

Bank of Phoenixville v. Buckwalter, 214 Pa. St. 289.

In *Costigan v. Lunt*, 104 Mass. 217, the court said: "His contract was to build a boat for both of them, and when finished was to belong to both of them as tenants in common. But their promise to pay for it is several and joint. It is true they expressed themselves in the plural number and use the expression 'we will pay,' but the terms of this promise must be considered as qualified by the stipulation that each of the defendants is to pay one-half. Taking the whole instrument together, it must be interpreted as providing that each defendant shall pay one-half and no more."

Liability of Corporations.—Parties dealing with a corporation are, of course required to take notice of the authority of the corporation, but the same strictness is not required as to the manner in which the authority is exercised.

In *Merchants' National Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453, it is held:

"If a corporation permits its treasurer to act as its fiscal agent, and holds him out to the public as having the general authority implied from his official name and character, and by its silence and acquiescence suffers him to draw drafts, and to indorse notes payable to the corporation, it is bound by his acts within the scope of such implied authority."

In *National Spraker Bank v. Geo. C. Treadwell Co.*, 80 Hun. 363, 30 N. Y. Supp. 77, the syllabus reads:

"The fact that a promissory note was made by the president of a corporation, and was not signed by its treasurer in accordance with the by-laws of the company, constitutes no defense to an action thereon if the paper was not diverted from its original purpose, went into the hands of a bona fide holder and the company received the benefit of the proceeds."

In *Allegheny City v. McClurkan & Co.*, 14 Pa. 81, the court says:

"The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, when these contracts, for a series of times, were entered into publicly, and in such a manner, as by necessary and irresistible implication to be within the knowledge of the corporators. It was the acquiescence of the corporators, and the habit and custom of business of the corporation, which induced the public to give credit to the scrip or notes, which was evidence of contract. But when to this circumstance we add that the corporators themselves received the value of these notes or contracts in the erection of improvements in the city, and enjoyed and still enjoy the value of them, the conclusion is irresistible that the corporators ought to pay them by the assessment of taxes on the corporations, if it has no other available means. The debt is due by positive engagement—it is due *ex aequo et bono*—in the forum of conscience, and the forum of law. One rule of law is often met and counterchecked by another of equal force, so that although the corporators are in general protected from unauthorized acts of their agents, yet at the same time a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them. They adopt the act and are responsible to those who on the faith of such acquiescence and approbation trusted their agents."

Complaint against maker of note**(TITLE OF CAUSE)**

The plaintiff in the above entitled action complains of the defendant and alleges on information and belief, that the defendant herein, on or about theday of in the year 191..., at, for value received, made his promissory note in writing, of which the following is a copy:

(COPY OF THE NOTE)

And then and there delivered the same to the said the payee therein named, and the said note was thereafter, before it became due, duly transferred and delivered to plaintiff, for value, who then became and still is the holder and owner thereof. That said note became due and payable on the day of 191....

That when the said note became due and payable it was duly presented at the place therein named for payment, and payment thereof duly demanded, which was refused, and said note was thereupon duly protested for such non-payment, and plaintiff paid notary's fees of protest.

That before the commencement of this action said note became wholly due and now remains wholly unpaid. That there is now due thereon, from the said defendant to the plaintiff the sum of dollars, with interest thereon from the day of 191, besides said notary's fees of protest.

That all the parties to this action are now, at the time of the commencement of this action, residents of the of County of, in the State of

WHEREFORE, the plaintiff demands judgment against the said defendant for the sum of dollars and cents, with interest thereon from the day of 191 , and dollars and cents, notary's fees of protest, besides the costs of this action.

.....
Plaintiff's Attorney.

Complaint by accommodation maker**(TITLE OF CAUSE)**

The plaintiff of the above entitled action complains of the defendant therein and alleges upon information and belief: That on or about the day of 191..., made his promissory note in writing, of which the following is a copy: (Copy of note). That the said note was made at the special instance and request and for the accommodation of defendant herein, who promised

to pay the same at its maturity. And that the plaintiff never received any consideration therefor. That before maturity and for a valuable consideration defendant indorsed the said note and transferred the same to

That defendant failed to pay said note or any part thereof when by its terms it became due, or at any time thereafter.

That by reason thereof the plaintiff herein was compelled to pay and did pay the same on theday of191..... to

That demand has been made by plaintiff to defendant for the payment thereof and the same remains wholly unpaid.

WHEREFORE plaintiff asks judgment against defendant for the sum ofdollars, with interest from theday of191....., besides the costs of this action.

.....
Plaintiff's Attorney.

Complaint Against Maker and Indorser.

(TITLE OF CAUSE)

The plaintiff in the above entitled action complains of the defendant therein and alleges on information and belief, that the defendant (name of maker), on or about theday of in the year 191...., at....., for value received, made his promissory note in writing, of which the following is a copy:

(COPY OF NOTE)

And then and there delivered the same to the said..... the payee therein named, and the said defendant afterwards endorsed the said note; and before maturity, for value received, duly transferred and delivered the same to plaintiff, who then became and still is the owner and holder thereof.

That said note became due and payable on theday of191.....

That when said note became due, and before the commencement of this action, it was duly presented atBank, the place therein named for payment, and payment thereof duly demanded, which was refused, and said note was thereupon duly protested for non-payment, of all which the said defendant had due notice, and plaintiff paid notary's fees of protest.

That the said defendant has not paid the said note or any part thereof.

That there is now due thereon from the defendant to the plaintiff the sum ofDollars and Cents (\$.....), with interest thereon from saidday of19....., and said notary's fees of protest.

*That all the parties of this action are now, at the time of the commencement of this action, residents of the of
County of in the State of*

*WHEREFORE, the plaintiff demands judgment against the said defendant for the sum of Dollars and
..... Cents (\$.....), with interest thereon from the
..... day of 191..., besides the cost of this
action.*

.....
Plaintiff's Attorney.

(Verification).

§ III. Liability of drawer. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

Variant.—The Colorado and Illinois stateutes omit the word “subsequent” near the end of the first sentence. The New York, District of Columbia, North Dakota and English Acts read “accepted *and* paid.”

The drawer of a bill of exchange undertakes that there shall be paid to the holder of the instrument the sum of money therein mentioned at the place named.

Hibernian National Bank v. Lacombe, 84 N. Y. 367; *Amsick v. Rogers*, 189 N. Y. 252.

The drawer of a check undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will there be paid to the holder when the check is presented; and if not so paid and he is notified, he becomes absolutely bound to pay the amount at the place named.

Hibernia National Bank v. Lacombe, 84 N. Y. 367; *Usher v. Tucker*, 217 Mass. 441, 105 N. E. 360.

A bill of exchange upon acceptance becomes in effect a promissory note, the acceptor standing in the place of the maker and becoming primarily liable, and the maker standing in the place of the first indorser.

U. S. Rail Co. v. Wiener, 169 App. Div. (N. Y.) 561.

Drawer's liability as to stolen checks.—Where a blank check left by the drawer with his bookkeeper is stolen by an employee, filled out and collected, the payment by the drawee bank is valid as against the drawer. The drawer is under a duty to see that his checks do not get into the hands of those for whom they are not intended.

Trust Company of America v. Conklin, 65 Misc. Rep. (N. Y.) 1, 119 N. Y. Supp. 367; Phillips v. Joy, (Me.) 96 Atl. 727.

Where a check, complete in every respect, except as to delivery, is stolen from the drawer by the payee and negotiated by the latter to a holder in due course, the holder is entitled to recover thereon.

Schaeffer v. Marsh, 153 N. Y. Supp. 96.

While the bank upon which a check is drawn is protected in paying a check signed in blank, never delivered but stolen, the purchaser of such a check is not protected. Illustrating this is *Linick v. Nutting & Co.*, 125 N. Y. Supp. 93. In that case a depositor signed his name to a blank check. The check was stolen from him, the name of a payee inserted, certification procured by the drawee, and the check was then negotiated for value to defendant who collected the amount from the drawee. The drawer took up the check from the drawee and brought suit against the defendant as for money had and received for the amount of the check. The court held that the drawer was entitled to recover because the check was never delivered and therefore never had any valid inception as a contract. The court pointed out the difference in the relation of a drawer, who signs a check in blank which is stolen, to the drawee which pays such check and to the purchaser. It said that in view of the contractual relation existing between the bank and its depositor under which the bank is bound to pay his genuine checks, the depositor owes a duty of care to the bank. But a third person is under no obligation to honor his check, he can take it or not as he pleases, and as to the purchaser, the depositor in drawing a check is not obliged to guard against the possibility of being deprived of the possession of an incomplete negotiable instrument by a crime. The defendant in this case contended that, as against the depositor, the drawee bank was justified in paying out the money on the check; therefore the payment being good, the depositor should not be entitled to recover it from the holder who received the money. But the court said that if the drawee bank was justified, as against its depositor in paying such a check, and could charge the same to his account, this was not because the check was a valid check in the hands of a third person, but because of the peculiar contract relation between the bank and its depositor. Not being a valid obligation in the hands of the defendant, the action by the depositor for money had and received would lie.

Liability on mutilated checks.—In paying without inquiry a check which has been torn in pieces and pasted together again, a bank is guilty of negligence and is responsible to the drawer for such loss as he suffers.

Scholey v. Ramsbottom 2 Camp. (Eng.) 485; *Ingham v. Primrose*, 7 C. B. N. S. (Eng.) 82.

Liability on checks delivered to an impostor, or wrong person.—Where the drawer of a check delivers it to an impostor, believing him to be the payee named in the check, the indorsement thereof by the impostor is not a forgery, and the drawer is liable to any subsequent bona fide holder.

Burrows v. Western Union Tel. Co., 86 Minn. 499, 90 N. W. Rep. 1111; *First Nat. Bank v. American Exch. Nat. Bank*, 49 N. Y. App. Div. 349, 63 N. Y. Supp. 58, Affd., 170 N. Y. 88, 62 N. E. Rep. 1089; *Gallo v. Brooklyn Savings Bank*, 129 N. Y. App. Div. 698, 114 N. Y. Supp. 78; *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. Rep. 165. *United States v. National Exchange Bank*, 45 Fed. Rep. 163; *Hoge v. First Nat. Bank*, 18 Ill. App. 501; *Meridian Nat. Bank v. First National Bank*, 7 Ind. App. 322; *Meyer v. Indiana National Bank*, 27 Ind. App. 354, 61 N. E. Rep. 596; *Emporia National Bank v. Shotwell*, 35 Kan. 360; *Sherman v. Corn Exch. Bank*, 91 N. Y. App. Div. 84, 86 N. Y. Supp. 341; *McHenry v. Old Citizens' National Bank, Ohio*, 97 N. E. Rep. 395. But see *Tolman v. American National Bank*, 22 R. I. 462, 48 Atl. 480.

Where a check is enclosed in a letter which is misdirected by mistake of the drawer of the check, and the letter is delivered to another person of the same name as the payee, who indorses and negotiates the check, which is finally received by the drawee bank and paid and charged to the drawer's account, the latter cannot recover from the bank.

Weisberger v. Bank, 84 Ohio St. 21.

Complaint by payee against drawer.

(TITLE OF CAUSE)

The plaintiff in the above entitled action complains of the defendant therein and alleges, on information and belief, that the defendant for value received, on the day of..... 191, made and delivered to plaintiff herein his check in writing, dated that day, directed to the Bank, thereby directing said bank to pay to(or bearer) the sum of dollars. That thereafter and on theday of191.... the said check was presented to the saidBank and payment thereof demanded, which payment was refused, and the said check remains wholly unpaid. That there is now due and owing plaintiff from defendant thereon the sum of

..... dollars with interest from the day of
 191....., for which amount plaintiff demands judgment,
 besides the costs of this action.

.....
 Plaintiff's Attorney.

Complaint by holder against drawer and indorser

(TITLE OF CAUSE)

The plaintiff in the above entitled action complains of defendants herein and alleges upon information and belief, that the defendant (name of the drawer), for value received, on or about the day of..... 191....., made and delivered his check in writing, dated that day, directed to the Bank, thereby directing said bank to pay (name of the payee) or order, the sum of dollars. And the said defendant..... (payee), for value received thereafter indorsed said check and delivered the same to the plaintiff herein, who became and is now the owner and holder thereof. That thereafter the said check was duly presented to the Bank, where by the terms the same was made payable, and payment thereof demanded, which was refused, and said check was thereupon duly protested for such non-payment, of all which the defendants had due notice, and the plaintiff herein paid..... dollars and..... cents, notary's fees of protest. That defendants have not paid said check or any part thereof. That there is now due and owing thereon from the defendants to plaintiff the sum of dollars, with interest thereon from the day of 191....., besides the notary's fees of protest.

That all the parties to this action, are now, at the time of the commencement of this action residents of the County of, in the State of

WHEREFORE plaintiff demands judgment against defendants for the sum of dollars, with interest from the..... day of, besides protest fees and the cost of this action.

.....
 Plaintiff's Attorney.

§ 112. **Liability of acceptor.** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

Variant.—The Missouri statute omits the word “then” in Subd. 2.

The legal meaning of acceptance is that the acceptor engages to pay the instrument according to the tenor of his acceptance. In other words it is a promise to pay. Up to the time of the acceptance the payee looks exclusively to the drawer.

Bloomington v. Smith, 123 Ind. 41; *Industrial Bank v. Bowes*, 165 Ill. 70; *Henerematte v. Morris*, 101 N. Y. 63.

The acceptor by his acceptance guarantees the genuineness of the drawer's signature, but not the genuineness of any other names upon the paper or of the body of the paper in respect to the date and amount thereof.

Cleus v. Bank of N. Y. Banking Ass'n., 89 N. Y. 422; *Holt v. Ross*, 54 N. Y. 472; *White v. Continental National Bank*, 64 N. Y. 316; *National Reserve Bank v. Corn Exchange Bank*, 157 Supp. 316.

“The reason usually assigned is, that when the bill is presented for acceptance the acceptor looks to the handwriting of the drawer with which he is presumed to be acquainted, and he affirmed the genuineness by giving credit to the bill, by his acceptance in favor of the legal holder thereof. But the acceptor cannot be presumed to have any such knowledge of the other facts upon which the rights of the holder may depend.”

Story on Bills, Sections 262, 263.

In analogy to this, courts have held that the certificate only holds the bank for the truth of the facts presumed to be within its own knowledge, viz: the genuineness of the signature of the drawer and the state of his account. Moneys paid upon checks and drafts which have been forgeries, either in the body of the instrument or the indorsements, or in any respect, except the name of the drawer, have uniformly been held recoverable as for money paid by mistake.

Canal Bank v. Bank of Albany, 1 Hill 287; *Marine National Bank v. National City Bank*, 59 N. Y. 69; *Continental National Bank of N. Y. v. Tradesmen's National Bank of New York*, 36 App. Div. 112; *Danvers Bank v. Salem Bank*, 151 Mass. 280.

When a drawee pays a check upon which the drawer's signature had been forged, he cannot upon the discovery of the forgery, recover back the amount if the party to whom he paid was a bona fide holder.

Bank v. Bank, 17 Am. St. 890 and cases cited; *First National Bank v. Savings Inst.* 62 Barb. 101; *State Bank v. Cumberland Trust Co.*, 168 N. C. 605.

For more than a century it has been held and decided without question, that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money paid.

National Park Bank v. Ninth National Bank, 46 N. Y. 77; *Title Guarantee & Trust Co. v. Haven*, 126 App. Div. (N. Y.) 802; *First National Bank v. Bank of Cottage Grove*, 59 Or. 388; *Trust Co. of America v. Hamilton Bank*, 127 App. Div. 515; *Farmers Bank of Augusta v. Farmers Bank of Maysville*, 159 Ky. 141; *Iron City Bank v. Fort Pitt Bank*, 159 Pa. St. 46.

The rule that one who accepts a negotiable instrument to which the drawer's name is forged is bound by the act and can neither repudiate the acceptance nor recover the money paid, has no application in behalf of one who has acquired the paper in the absence of any consideration whatever therefor either present or past.

Title Guarantee & Trust Co. v. Haven, 196 N. Y. 493; *Bank of Danvers v. Salem Bank*, 151 Mass. 280.

If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft.

Hentermatte v. Morris, 101 N. Y. 70.

The payment of a bill or check by the drawee amounts to more than an acceptance. The rule, holding that such a payment has all the efficacy of an acceptance is founded upon the principle that the greater includes the less.

Bank v. Bank, 141 Mo. App. 719; 125 S. W. 513; *Neal v. Coburn*, 92 Me. 139.

An acceptance binds the acceptor to pay the bill, and he cannot be heard to deny that he has funds in his hands for the purpose. A payment of a bill is more than an acceptance, for the one is an obligation to pay; the

other a discharge of the indebtedness represented by such bill. If the one includes the drawee, it is inconceivable why the other would not. Where the holder of a check procures it to be accepted or certified, the indorsers are discharged from liability and the bank is precluded from setting up that the check was forgery.

Title Guarantee Trust Co. v. Haven, 126 App. Div. 802; Bank of Rolla v. Salem Bank, 141 Mo. App. 719; Farmers Bank v. Rutherford Bank, 115 Tenn. 64; Bank of Commerce v. Mech. National Bank, 148 Mo. App. 1.

Most of the courts agree that one who purchases a check or draft is bound to satisfy himself that the paper is genuine; and that, by indorsing it, or presenting it for payment, or putting it into circulation before presentation, he impliedly asserts that he has performed his duty. The great weight of authority is between the two propositions; that is, that notwithstanding the payee has accepted the check and paid it, yet if it is afterwards discovered to be a forgery and the purchaser of the check took it from a stranger without making proper inquiry as to his identity, the payee can recover from the purchaser the amount of the check. The courts adopting the theory that the payee can recover where it is shown that the purchaser of the check was guilty of negligence in taking the same are numerous and among them are:

First National Bank v. First National Bank, 151 Mass. 280; Ford v. Bank, 54 S. E. 204; 10 L. R. A. 63; National Bank v. Bangs, 106 Mass. 441.

Drawees of a draft to which forged bills of lading were attached and of which the draft made no mention, having accepted such draft obligated themselves to pay it according to their acceptance.

Springs v. Hanover National Bank, 145 App. Div. (N. Y.) 188.

The subject generally, see, Title Trust Co. v. Hayes, 214 N. Y. 472; Title Guarantee Co. v. Hayes, 196 N. Y. 493; Carnegie Trust Co. v. First National Bank, 213 N. Y. 305; Rouvant v. San Antonio Bank, 63 Tex. 610; Consolidated National Bank v. First National Bank, 129 App. Div. (N. Y.) 538.

Complaint against acceptor, maker and indorser of Bill of Exchange.

(TITLE OF CAUSE)

The plaintiff in the above entitled action complains of defendants and alleges on information and belief that the defendant, at , made his bill of exchange or draft in writing, of which the following is a copy: (Copy of bill). That thereafter the defendant (acceptor) accepted said draft and the same

*was for value received, indorsed by the defendant,
(indorsee) and by him, for value, transferred and delivered to plaintiff herein.*

*That at maturity the payment of said draft was duly demanded, which payment was refused, and the same was thereupon duly protested for non-payment, and notice of said demand and non-payment was duly given to defendants herein, the expense of which protest was.....
dollars andcents.*

*That said defendants have failed to pay said draft or any part thereof and are justly indebted to plaintiff thereon in the sum of
dollars, with interest from the.....day of....., 191....., and
..... dollars protest fees.*

WHEREFORE, plaintiff asks judgment in said amount, besides the cost of this action.

Plaintiff's Attorney.

§ 113. When person deemed indorser. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

See notes, Section 114.

This rule is founded upon commercial necessity. The unshackled circulation of negotiable notes is a matter of great importance. The different forms of commercial instruments take the place of money. To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions.

By this section the presumption as established by the courts of many of the states was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute.

An indorsement made by means of a rubber stamp is valid and sufficient to transfer title to the instrument indorsed.

Mayors v. McRimmon, 140 N. C. 640, 53 S. E. Rep. 447.

A person who signs his name in blank before delivery, upon the back of a draft, payable to the drawer, which has been accepted by the drawee, is an indorser within the meaning of this section.

Blanchard & Co. v. Haddock, 192 N. Y. 499.

A person who places his name on the back of a negotiable note before delivery, was an indorser, where there was nothing to indicate that he intended to be bound in any other capacity.

Phoenix Bank v. Hanlon, 166 S. W. (Mo.) 830.

One who became the payee of a note and indorsed the same to enable the maker to negotiate and discount it for his own benefit, is liable as an accommodation indorser.

Merchants & Farmers Bank v. Katterjohn, 125 S. W. 1071.

A person who indorsed upon the back of the note, "I hereby guarantee payment of the within note" was not an "indorser," having indicated by the appropriate word "guarantee" his intention to be bound in that capacity and not as the indorser.

Noble v. Beeman Co., 65 Or. 93.

The fact that persons who signed their names in blank upon a note given by a corporation, and as such officers executed the note in its behalf, did not enlarge their individual liability, which was that of indorsers only, who could not be held, except on presentment, demand and notice of non-payment by the principal.

McDonald v. Luckenbach, 170 Fed. 434;

The legal obligation of an indorsing payee on a promissory note is that of an indorser only, and cannot be considered or proven to be that of a maker.

Burwell v. Gaylord, 119 Minn. 426; First National Bank v. Payne, 111 Mo. 291; Finley v. Green, 85 Ill. 535; Dubois v. Mason, 127 Mass. 37.

An indorsement on a note, "I transfer my right, title and interest in the same" is not a qualified indorsement and does not limit the liability of the indorser.

There are two widely divergent lines of authority in cases of this kind, one line holding that a memorandum of similar import to that here used exempts the indorser from personal liability or constitutes him a mere assignor. One of the leading cases sustaining this line of holding is Hailey v. Falconer, 32 Ala. 536, in which it is held that an indorsement in these words:

"For value received this 28th day of February, 1850, I transfer unto John P. Hailey all my right and title in the within note, to be enjoyed in the same manner as may have been by me."

—exempts the indorser from personal liability on the note. Another authority, strongly sustaining this line, is Spencer v. Halpern, 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120, the indorsement in that case being in these words:

"For value received, I hereby transfer my interest in the within note to Isaac Halpern, Geo. Spencer"

—the court in the course of the opinion saying:

"Had the payee intended to be bound as indorser, why use so many words? Had the transferee expected more than 'the interest' of the transferor, why did he accept the instrument transferring only his interest? We must accept and interpret the completed contract as the parties made it. They have been proper to express it at length, and have used unambiguous terms. Construing the terms, 'my interest,' most strongly against the transferor, we do not feel authorized to say they mean anything more than simply 'my interest.'"

The court in this case adopts the maxim, "*Expressio unius est exclusio alterius*," and rejects the maxim, "*Expressio eorum quae tacite insunt nihil operatur*." This line is further sustained by Tiedeman on Commercial Paper, 265:

"The declaration that the payee assigns or transfers all his right, title and interest in the paper would seem to limit in a most effective way the right acquired by the transferee to those which the transferor had therein, and thus prevent the writing from operating as an indorsement."

The other line of authority is to the effect that an indorser, in order to limit his personal liability, must do so by words clearly expressing such intent. Some of the decisions sustaining this line are as follows: The early English case of *Richards v. Franklin*, 9 Car. & P. 221, cited by Mr. Tiedeman, in which the indorsement was in these words:

"I hereby assign this draft and all benefit of the money secured thereby to John Grainger of Bessilsleigh, in the county of Berks., laborer; and order the within named Thomas Fox Hitchcock to pay him the amount and all interest in respect thereof."

The most often cited authority is the case of *Sears v. Lantz & Bates et al.*, 47 Iowa, 658, in which the indorsement was in these words:

"December 18th, 1876, I hereby assign all my right and title to Louis Meckley. John Bowman."

—which the court held to be equivalent to an indorsement of the note, and bound the assignor as an indorser, the court following the earlier case of *Sans v. Wood*, 1 Iowa, 263, in which the same holding was made upon an indorsement in these words, "I assign the within note to Miss Sarah Coffin." The same holding is made in the case of *Adams v. Blethen*, 66 Me. 19, 22 Am. Rep. 547, upon a similar indorsement. In the case of *Citizens' National Bank v. Walton*, 96, Va. 435, 31 S. E. 890, the court holds:

"Writing on back of negotiable note, signed by one of its two payees, 'For value received, I hereby assign and transfer to F all right, title, and

interest that I may have in the within note,' renders him liable to an innocent holder as an indorser, and not as an assignor, and without regard to the equities between him and the other payee, though F be such payee."

In the case of *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698, it is held:

"The negotiability of a promissory note is not destroyed because of an indorsement thereon that it is given in accordance with a certain contract, although the note is one of a series which, by the terms of such contract, were to become payable, at the option of the payee, on failure to pay any of them."

The court in this case follows the Iowa cases above referred to, and says:

"The usual mode of transfer of a promissory note is by simply writing the indorser's name upon the back, or by writing also over it, the direction to pay the indorsee named, or order, or to him or bearer. An indorsement, however, may be made in large terms and the indorser be held liable as such."

The Supreme Court of Minnesota, in the case of *Maine Trust & Banking Co. v. Patrick J. Butler*, 45 Min. 506, 48 N. W. 333, 12 L. R. A. 370, in a well-reasoned case, follows the doctrine laid down in *Daniel on Negotiable Instruments*, and cites with approval the Iowa and Maine cases above referred to, and adopts the latter maximum referred to by the Arkansas court in the case of *Spenser v. Halpern*, *supra*. In the case considered by the Minnesota court the indorsement was in these words:

"For value received I hereby assign and transfer the within note, together with all interest in and all rights under the mortgage securing the same, to L. D. Cooke."

—and the court held that this was not a qualified indorsement, and that the payee was liable as an ordinary indorser.

A person signing before the payee indorsed the note has been held under this section to be an indorser, and as thus warranting the capacity of the prior parties to the contract.

Rockfield v. First National Bank, 77 Ohio St. 311; *Yonkers National Bank v. Mitchell*, 156 App. Div. 318.

Parol Evidence.—Considerable diversity of decision is found in the reported cases where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of

the parties, and in most cases it is admitted that proof of facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed.

Good v. Martin, 95 U. S. 90; *Cavazos v. Trevino*, 6 Wall. 773. But see, *Bird v. Kay*, 40 App. Div. (N. Y.) 537; *Hodgens v. Jennings*, 148 App. Div. (N. Y.) 881.

Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated, and the true intention of indorsers as between themselves can be shown by parol evidence.

4 Am. & Eng. Ency. of Law (2nd ed.) 492; *Guild v. Butler*, 127 Mass. 386; *Cady v. Shepard*, 12 Wis. 639; *Witherow v. Stayback*, 158 N. Y. 649; *Haddock v. Blanchard & Co.*, 192 N. Y. 500; *Germania Bank v. Mariner*, 129 Wis. 544.

The statute fixing the legal effect of the instrument, parol evidence may not be received to give it a different effect.

Rockfield v. First National Bank, 77 Ohio St. 311; *Nimmel v. Weil*, 95 Ill. App. 19; *Deahy v. Chouquet*, 28 R. I. 340; *Toole v. Crafts*, 193 Mass. 110; *Peck v. Eastern*, 74 Conn. 456; *Gibbs v. Guaraglia*, 75 N. J. Law, 168; *Perry v. Taylor*, 148 N. C. 362; *First National Bank v. Bickel*, 143 Ky. 754.

Section generally, see, *Hibernia Bank v. Dresser*, 132 La. 532; *Wilson v. Hendee*, 74 N. J. Law, 646; *Mercantile Bank of Memphis v. Busby*, 120 Tenn. 652; *Dubois F. Mason*, 127 Mass. 37; *Roessle v. Lancaster*, 130 App. Div. (N. Y.) 5; *Perry v. Taylor*, 148 N. C. 362; *Rockfield v. Bank*, 77 Oh. St. 311.

§ 114. Liability of irregular indorser. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Variant.—The Illinois statute substitutes for subdivisions 1 and 2 the following: "1. If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is

liable to the payee and to all subsequent parties. 2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer."

See notes Section 113.

This section deals only with the liability of an irregular indorser to the payee and subsequent parties, and does not define the rights and liabilities of several irregular indorsers as between themselves. This is done by section 118. See notes.

Wilson v. Hendee, 74 N. J. L. 640.

The section only applies to those who place their signature as indorsers "before" delivery to the payee.

Kohn v. Butter & Egg Co., 30 Misc. 725, 63 N. Y. Supp. 265; Bender v. Bahr, 144 App. Div. (N. Y.) 742.

The subject covered by this section was prior to the adoption of the statute subject to much difference of opinion. The rule formerly followed by most of the states has been that the presumption is that a person making such an irregular indorsement intended to become liable as second indorser, and that on the face of the paper, without explanation, he is regarded as second indorser, and not liable to the payee, who is supposed to be the first indorser. But it is competent to rebut this presumption by parol proof that the indorsement was made to give the maker credit with the payee.

Coulter v. Richmond, 59 N. Y. 478.

The rule followed in Phelps v. Vischer, 50 N. Y. 69, to the effect that an accommodation indorser of a promissory note is not liable to the payee thereof, unless it is alleged and proved that the accommodation indorser indorsed the note for the purpose of giving the maker credit with the payee, has been abrogated by this section.

Corn v. Levy, 97 App. Div. (N. Y.) 48; Far Rockaway Bank v. Norton, 186 N. Y. 484, affirming 110 App. Div. 917; Haddock v. Haddock, 192 N. Y. 499, 508.

An indorser's liability is contingent upon due protest and notice thereof.

Colonial National Bank v. Duerr, 108 App. Div. 215; Hayward v. Empire Sugar Co., 105 App. Div. 31.

Parol evidence.—The rule relating to the receipt of parol evidence to determine the primary liability as between persons whose names appeared upon the instrument or as between those secondarily liable thereon remains unchanged.

Haddock v. Haddock, 192 N. Y. 499, affg. 118 App. Div. 412; Far Rockaway Bank v. Norton, 186 N. Y. 484; Gibbs v. Guaraglia, 75 N. J. Law, 168; American Trust Co. v. Canevin, 184 Fed. Rep. 657; Baumeister v. Kuntz, 53 Fla. 340; Russell v. Lancaster, 130 App. Div. (N. Y.) 5; Franklin v. Kidd, 219 N. Y. 409.

Liability of partners indorsing individually.—A partner indorsing individually is a party different from the partnership, and thereby incurs a double liability arising from two distinct contracts by which he has bound himself.

Roger Williams National Bank v. Hall, 160 Mass. 171.

In Faneuil Hall National Bank v. Meloon, 183 Mass. 66, the court said, respecting the liability of partners indorsing a partnership note as individuals, that they "were none the less indorsers and none the less liable as such because they were also liable as members of the firm which made the note."

Fourth National Bank of Boston v. Mead, 216 Mass. 521.

Prior to the adoption of the negotiable instrument law a person indorsing an instrument in blank before delivery was deemed a second indorser, and hence not liable to the payee, who was considered the first indorser. (Bacon v. Burnham, 37 N. Y. 614.) This presumption, however, could be rebutted by proof that the indorsement was made for the purpose of giving the maker credit with the payee.

Coutler v. Richmond, 59 N. Y. 478.

Under the negotiable instruments law one who indorses a note prior to its delivery to the payee is liable as an indorser only, and is discharged unless the note is duly presented and notice of dishonor is given.

Rockfield v. First National Bank, 77 Ohio St. 311, 83 N. E. Rep. 392; Blanchard & Co. v. Haddock, 192 N. Y. 499, 692; Phoenix National Bank v. Hanlon, Mo., 166 S. W. Rep. 831; Gibbs v. Guaraglia, 75 N. J. Law 168, 67 Atl. Rep. 81; J. H. Perry & Co. v. Taylor Brothers, 148 N. C. 363, 62 S. E. Rep. 423; Lewy v. Wilkinson, La., 64 So. Rep. 1003; Deahy v. Choquet, 28 R. I. 338, 67 Atl. Rep. 421; Farquhar v. Higham, 16 N. D. 106; Baumeister v. Kuntz, Fla., 42 So. Rep. 886; Third National Bank v. Bickel, Ky., 137 S. W. Rep. 790.

Under the California Code one who indorses a note in blank before delivery to the payee is liable as an indorser only and he is entitled to notice of dishonor.

Navajo County Bank v. Dolson, 163 Cal. 485, 126 Pac. Rep. 153.

In Mississippi one who indorses a note in blank before delivery to the payee is liable as maker and is not entitled to notice of dishonor.

Lindsay v. Parrott, Miss., 66 So. Rep. 412.

Accommodation indorser.—In the case of indorsement for value of business paper the indorsement is an independent contract entered into by the indorser that he may sell the note, and no relation of principal and surety exists between him and the maker. Therefore, the only obligation or contract on which he can sue the maker is that expressed in the instrument itself. But in case of an accommodation indorsement the relation of principal and surety exists, and the surety has a right to pay the debt, thereby cancelling the note and the liability of the maker thereon, and then bring his action upon the implied promise, independent of the promise of the note of the maker to reimburse him. In such case the indorser when he has been compelled to pay the note has a right of action against the maker on an implied contract, even though the Statute of Limitations has run upon the note.

Blanchard v. Blanchard, 201 N. Y. 134.

In an action against indorsers of a promissory note who sign for the accommodation of the maker before the note was indorsed by the payee, the defense of invalidity and want of consideration are open in the same way that they would be against the maker.

Leonard v. Draper, 187 Mass. 536; *Quinby v. Varnum*, 190 Mass. 211.

In *Franklin v. Kidd*, 219 N. Y. 409, Graydon made a note to the order of defendant's testator, Kidd. Franklin indorsed it before delivery to the payee. The note was not paid, and the Bank of Hamilton, which had discounted it, recovered judgment against Franklin. Later Kidd, the payee, made payment to the bank and obtained an assignment of the judgment. Franklin now says that he indorsed the note for Kidd's accommodation; that as between Kidd and himself, the former was the primary debtor; and that the judgment in Kidd's hands is no longer an enforceable obligation. He asked, therefore, that it be canceled.

The indorsement of the note, though before delivery, gave rise to a presumption that the indorser was liable to the payee under this section. The presumption could, however, be rebutted by evidence that the indorsement was in truth for the accommodation of the payee.

Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499.

Since the statute the legal presumption is changed where the complaint alleges that the irregular indorsers indorsed the paper "before delivery" to the payee. And when this fact is established the onus is cast upon such indorsers to allege and prove that, notwithstanding such delivery, the payee was to become first indorser according to the customary form of the contract, and that they did not indorse for the purpose of lending their credit to the maker or with the intention of becoming liable to the payee. That this is the proper interpretation of the act is obvious. The

true intention of indorsers as between themselves, can always be shown by oral evidence.

Kohn v. Consolidated B. & E. Co., 30 Misc. 726; Dan. Neg. Int. Sec. 704; 4 Am. & Eng. Ency. of Law (2d ed.) 492; Guild v. Butler, 127 Mass. 386; Witherow v. Slayback, 158 N. Y. 649; Good v. Martin, 95 U. S. 90; Cavazoo v. Trevino, 6 Wall. 773; Cady v. Shepard, 12 Wis. 639; Kohn v. C. Butter & Egg Co., 30 Misc. 725; Rockaway Bank v. Norton, 186 N. Y. 484.

A holder in due course of a promissory note, although it has been materially altered without the consent of the indorser, may enforce payment of the note according to its original tenor against such indorser, if the holder was not a party to the alteration.

Thorpe v. White, 188 Mass. 333.

In an action against an indorser on a note, the indorsement having been made before delivery of the note to the payee, it is material under subdivision 3 whether it was given to the payee for a valuable consideration or whether it was given to him merely as a matter of accommodation.

Howard v. Van Geison, 56 App. Div. (N. Y.) 217.

It was not the intention of the legislature by the enactment of this section to establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves in an action where the facts showing a different intention are fully alleged.

Haddock v. Haddock, 192 N. Y. 512; 118 App. Div. 113; Corn v. Levy, 97 App. Div. 48; Guild v. Butler, 127 Mass. 386; Cady v. Shepard, 12 Wis. 639; 4 Am. & Eng. Ency. of Law, 250.

§ 115. Warranty; where negotiation by delivery or by a qualified indorsement. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

See notes Section 117.

An instrument which is negotiable by delivery is one which is either payable to bearer or has been indorsed in blank.

Subd. 1.—Where the holder of a promissory note, which is tainted with usury, transfers the same for a valuable consideration without indorsement and without representation as to legality, in the absence of knowledge on his part at the time of the transfer of the defect, no warranty against it will be implied, and an action cannot be sustained against him for loss sustained by the purchaser by reason of the defect; a *scienter* is essential to establish an implied warranty as to the validity of the note.

Littauer v. Goldman, 72 N. Y. 506.

See also, *Whitney v. National Bank of Pottsdam*, 45 N. Y. 303; *Bell v. Daggs*, 60 N. Y. 528; *Webb v. Odell*, 49 N. Y. 583; *Ross v. Terry*, 63 N. Y. 613; *Mandeville v. Newton*, 119 N. Y. 14; *Meyer v. Richards*, 163 U. S. 386.

An express warranty is a sale may be so framed as to exclude warranty implied by statute.

Giffert v. West, 37 Wis. 115.

Subd. 2.—A person who sells commercial paper as his own is understood to warrant his title thereto to be good and that the instrument is genuine.

M. N. Bank v. Gallaudet, 120 N. Y. 303; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Littauer v. Goldman*, 72 N. Y. 506.

In *Story on Promissory Notes*, Section 118, it is said that the holder warrants by implication, unless otherwise agreed, that he is the lawful holder and has title; that the instrument is genuine, and not forged or fictitious.

Subd. 3.—In *Thrall v. Newell*, 19 Vt. 202, where the note was invalid, as one of the signers was insane, and had successfully defended on that ground, the case turned somewhat upon the construction to be given to a written assignment to the plaintiff, which it was held must be construed as an expressed warranty on the part of the defendant that it was a valid note, and that the signers were of sufficient capacity to contract.

Subd. 4.—It is a fraudulent suppression, avoiding the sale of commercial paper, for the vendor to withhold information that the maker's check, upon the bank in which they kept their account, had been protested, though the vendor's informant accompanied his statement with the expression of his opinion that the makers were perfectly solvent.

Brown v. Montgomery, 20 N. Y. 287.

Where in an action upon negotiable paper the plaintiff appears as a purchaser for full value before maturity, the burden of proving that he had

notice of any fraud on the part of, or unauthorized use of the paper by the original holder, is upon the defendant.

Dalrymple v. Hellenbrand, 62 N. Y. 6; *Frank v. Lanier*, 91 N. Y. 112.

Saving Clause.—The assignee of a promissory note who obtains title from the payee without indorsement holds it subject to all equities and defenses existing between the original parties even though he pays full consideration.

Steinberger v. Hittleman, 93 Misc. 105.

Where one who transfers paper by delivery only incurs none of the liabilities which attach to an indorser for the reason that the inference is that he transfers it and it is received without his indorsement, such liabilities did not enter into the bargain or the intention of the parties. He only warrants that he has title or is lawfully entitled to dispose of it.

3 R. C. L. 1164; *Littauer v. Goldman*, 72 N. Y. 506; *Baxter v. Duren*, 29 Me. 434.

§ 116. Liability of general indorser. Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and,
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Variant.—The Illinois statute adds “not an accommodation party” between the words “indorser” and “who” in the first line; adds “and four” after “three” in subdivision one and substitutes “every indorser” for “he” in the first line of the last paragraph.

The warranty of genuineness of a note applies only to the condition of the instrument on leaving the hands of the indorser, and the indorser is not liable for changes which were thereafter made by the maker, without his knowledge.

First National Bank v. Gridley, 112 App. Div. (N. Y.) 398.

The full contract which the law implies from the indorsement of a negotiable promissory note on the part of the indorser, with the indorsee and every subsequent holder to whom it is transferred is, (a) that the instrument itself and the antecedent signatures thereon are genuine; (b) the indorser has a good title to the instrument; (c) that he is competent to bind himself by the indorsement as indorser; (d) that the maker is competent to bind himself to the payment and upon due presentment of the note pay it at maturity, or when it is due; (e) that if, when duly presented, it is not paid by the maker the indorsee will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder.

Binney v. Globe National Bank, 150 Mass. 574, 6 L. R. A. 379; *Spencer v. Allerton*, 60 Conn. 410; *Wheeler v. Traders Bank*, 107 Ky. 653, 49 L. R. A. 315.

Where a note was non-negotiable, the writing of the name of the transferee on the back of it operated as an assignment only without further liability.

Bright v. Offield, 143 Pac. (Wash.) 159.

The fact that the name of the maker was forged will not discharge the indorser.

Lennon v. Grauer, 159 N. Y. 433; *Harris v. Fowler*, 59 App. Div. (N. Y.) 522; *Williamsburg Trust Co. v. Tum Suden*, 120 App. Div. (N. Y.) 518; *National Bank of Danvers v. National Bank of Salem*, 151 Mass. 281.

One who indorses checks for deposit guarantees the validity of prior indorsements, including one alleged to have been forged.

Geering v. Metropolitan Bank, 170 App. Div. 751.

The indorser of negotiable paper does not, by his indorsement, warrant to the drawee of the genuineness of the signature of the drawer, but his indorsement extends such warranty only to subsequent holders in due course.

Farmers' & Merchants' Bank v. Rutherford, 115 Tenn. 64.

\$ 400.00	Providence R.I. Oct 25. 1905
Ninety days	after date we promise to pay to
the order of National Exchange Bank	
Four Hundred and no/100	Dollars
at National Exchange Bank	
Value received without interest	
For \$	For \$
	J. S. L. L. L.

*(INDORSED)***MICHAEL LUMBRANO**

Where a note was made in the firm name, and before delivery a member of the partnership placed his name on the back of the note, under this section he thereby added to his liability as maker a several and distinct liability as indorser, thereby making himself individually liable for the payment of the note, after due notice of dishonor, and also guaranteeing the signature on the face of the note, and rendering himself liable individually to an action by an indorsee.

National Exchange Bank v. Lumbrano, 29 R. I. 64.

The indorsement of a promissory note implies a guaranty by the indorser that the maker was competent to contract in the character in which by the terms of the note he purported to contract. The indorser cannot set up the incapacity of the maker for the purpose of defeating his own liability.

Young's Estate, 234 Pa. St. 287.

One who indorses a promissory note, purporting to be executed by a co-partnership, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon his indorsement.

Dalrymple v. Hillenbrand, 62 N. Y. 5.

Alteration.—The indorsement of all the payees of a promissory note is necessary to give good title to a transferee, and hence an indorser of a note made payable to several payees is not liable to a transferee thereof, when the maker without authority from or knowledge of the indorser has altered the note before negotiation by striking out the name of one payee and substituting his own name as payee thereon.

National Bank of City of Brooklyn v. Gridley, 112 App. Div. (N. Y.) 398.

If the note be raised by the maker, without the knowledge of the accommodation indorser, subsequent to such indorsement the accommodation indorser is only liable for the amount of the note as indorsed by him.

Packard v. Windholz, 88 App. Div. (N. Y.) 365, affirmed 180 N. Y. 549; National Park Bank v. Seaboard Bank, 114 N. Y. 28; N. Y. Produce Exchange Bank v. Twelfth Ward Bank, 135 App. Div. (N. Y.) 52.

By indorsing his name on the back of a note and delivering it in that form to the holder, the maker does not become an indorser. His signature on the back being an essential part of its execution and his liability is that of maker only. He does not thereby enter into the contract of an indorser, which is to pay the note if the maker, upon demand, fails to do so at

maturity, and due notice thereof is given. It would be a useless ceremony, if not an absurdity, to require the holder to make a demand of the maker and give him notice of his own default in order to charge him with the payment of the note. He is liable as maker without demand and notice and sustains no other legal relation to the paper.

Ewan v. Brooks, 55 Ohio St. 596; 35 L. R. A. 786; 3 R. C. L. 1179.

Counterclaim and set-off.—While the indorser of a promissory note is said to be secondarily liable, the holder of a note may sue both the maker and indorser, or either, and the indorser sued upon his contract of indorsement is absolutely liable thereon. Where the indorser is himself sued, he may plead as a set-off the indebtedness of the holder to him.

Curtis v. Davidson, 215 N. Y. 395; Building & Engineering Co. v. Northern Bank of N. Y., 206 N. Y. 400; Armstrong v. Warner, 49 Oh. St. 376, 390; Van Wagoner v. Paterson Gas Co., 23 N. J. Law, 283; County National Bank v. Massey, 192 U. S. 138, 148; Scott v. Armstrong, 146 U. S. 499, 510; Hughitt v. Hayes, 136 N. Y. 163, 167; Carnige Trust Co. v. Kistler, 89 Misc. N. Y. 404.

An indorser who is also maker merely warrants the genuineness of his own contract.

Sabine v. Paine, 166 App. Div. 10.

Indorsement by executor.—An executor, even if vested with full authority by the probate of the will and the issuance of letters testamentary, has no power to bind the estate by making a contract of indorsement.

Schmittler v. Simon, 101 N. Y. 554; Packard v. Dunfee, 119 App. Div. (N. Y.) 601.

\$ 900	St. Louis Mo Jan 2 1917.
Six months	after/dates I promise to pay to
the order of George W. May	
Nine hundred	Dollars
at First Nat Bank	
Value received	
For	John Pomeroy

(INDORSED)

SAMUEL GREEN EXR.

GEO. W. MAY

Neither executors or administrators have power to bind the estate represented by them through an executory contract, having for its object

the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the property as owners and have no principal behind them for whom they can contract. The title vests in them for the purpose of administration and they must account as owners to the persons ultimately entitled to distribution. In this case Samuel Green would be liable personally as an indorser, the addition of the word "Exr." after his name is merely descriptive. The estate which he may represent would in no way be liable under the form of the indorsement regardless of his lack of authority to indorse in behalf of the estate.

Schmittler v. Simon, 101 N. Y. 554; *Connor v. Clark*, 12 Cal. 168; *Foster v. Fuller*, 6 Mass. 758; *Wilcox v. Dwyer*, 132 Mass. 285.

Where in an action against the maker and indorsers of a promissory note it appears that the note was indorsed for the accommodation of the maker before its delivery and negotiation for value, the defense of usury is available to the indorsers. This section applies only to cases between a holder and an indorser as such, the warranty by the indorser runs only to a holder in due course.

Brunck v. Lambeck, 63 Misc. 117.

The defense of want of consideration is also available.

Leonard v. Draper, 187 Mass. 536.

An indorser of a note who, upon the default of the maker, satisfies the demands of the indorsee and takes up the note, becomes the lawful holder and may enforce the terms of the contract against all prior indorsers who have been notified of the dishonor, as well as against the maker.

Ainslie v. Wilson, 7 Cow. (N. Y.) 247; *Abraham v. Mitchell*, 112 Pa. St. 230; *Sheahan v. Davis*, 27 Ore. 278, 40 Pac. 405.

Every indorser on a note or bill is liable for its payment. Each party in the following diagram is responsible to each one below him:—

IN A NOTE.	ACCEPTED DRAFT.	CERTIFIED CHECK.
1. Maker.	1. Acceptor.	1. The Bank.
2. 1st Indorser.	2. Drawer.	2. 1st Indorser.
3. 2nd Indorser.	3. 1st Indorser.	3. 2nd Indorser.
Etc.	4. 2nd Indorser.	Etc.
	Etc.	

Parol evidence.—An unqualified indorser of a secured installment note cannot vary his contract of indorsement by parol evidence that the indorsee at the time of the indorsement agreed to keep him advised respecting the time and amount of payments and failed to do so.

Hopkins v. Merrill, 79 Conn. 637; Smith v. Caro, 9 Ore. 278; Goldman v. Davis, 23 Cal. 256.

In an action by a holder in due course of a negotiable promissory note indorsed by the payee in blank, against such payee as indorser, it is no defense that it was orally agreed that said indorsement was to be without recourse to him.

Aronson v. Nurenberg, 218 Mass. 376; Eaton v. McMahon, 42 Wis. 484; Charles v. Denis, 42 Wis. 56.

Whether or not the rule forbidding parol evidence to vary the terms of a written instrument is to be deemed to apply to actions upon notes between the parties thereto, has no application to actions between the makers or obligees of notes for contribution. In such case the action is upon a different and collateral agreement, and proof or oral collateral agreement that as between themselves the parties shall stand in a different relation from that which would be inferred from the form of the instrument which is signed, or even from that which is expressed in explicit terms upon the face of such instrument, does not have the effect to contradict or vary its terms. The written instrument is designed to express the undertaking and obligation of the signers to the holder and is not designed to show their agreement or understanding among themselves.

Mansfield v. Edwards, 136 Mass. 15; Williams v. Glenn, 92 N. C. 253; 53 Am. R. 416; Bulkeley v. House, 62 Conn. 459; 21 L. R. A. 247.

§ 117. Liability of indorser where paper negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

This section seems to be declaratory of the law.

Cover v. Meyers, 75 Md. 406; Dan. Neg. Inst. Law, Sec. 663a, 707a.

§ 118. Order in which indorsers are liable. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorseees who indorse are deemed to indorse jointly and severally.

Variant.—The Illinois statute substitutes for the last sentence the following: "All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable."

This section is substantially a re-enactment of the law as established by the following cases:

Moore v. Cross, 19 N. Y. 227; Coulter v. Richmond, 59 N. Y. 475; Culliford v. Walser, 158 N. Y. 65; Davis v. Bly, 164 N. Y. 527.

In the absence of contrary proof, the parties to a promissory note are liable thereon according to the legal effect of the instrument; that is, the maker is liable to the payee and indorsers, the payee to the indorsers, and each indorser to the subsequent indorsee.

Brewing Co. v. Canning, 210 Mass. 285.

Liability of indorsers.—Where a second indorser of a promissory note has paid and taken it up, he becomes a holder for value and may maintain an action to recover the amount thereof of the first indorser, although both are accommodation indorsers.

Kelly v. Burroughs, 102 N. Y. 93.

In an action by the holder of a promissory note against an indorser a defense alleging that the plaintiff made false representations to induce defendant to make certain purchases for which the notes were given is insufficient in law in the absence of an allegation that the representations were false to the knowledge of the plaintiff when made.

Hodges v. Jennings, 148 App. Div. (N. Y.) 880; Reinhart v. Schall, 69 Md. 252.

Where one makes his own note for the accommodation of the payee and one or more subsequent indorsers, and is compelled to pay the note at its maturity to a bona fide holder for value, he may recover from the parties for whose accommodation he made the note the amount so paid with interest.

Morgan v. Thompson, 72 N. J. L. 244; see also, Haddock v. Haddock, 118 App. Div. (N. Y.) 413.

One who obtains possession of a bill or note after indorsing it, is restored to his original position, and cannot, nor can a purchaser from him with notice, hold intermediate indorsers liable who could look to him again, and when such indorsements are in blank, parol evidence is admissible to show the relations in which they stand.

Moore v. First National Bank, 120 Am. St. Rep. 126; Adrian v. McCaskill, 103 N. C. 181; Garden City Bank v. Fitler, 155 Pa. 210; Berney v. Steiner, 54 Am. St. Rep. (Ala.) 144.

Order of Liability.—In the case of an accommodation note the payee who was the first indorser is considered as having lent his name to the maker on the credit of the latter alone; the second indorser as having lent his name upon the credit of the maker and the prior indorser, and so every subsequent indorser as having lent his name upon the credit of those who became parties to the note before him.

Russ v. Sadler, 197 Pa. St. 51; Wolf v. Hostetter, 182 Pa. St. 292.

Every indorser is liable directly to the holder of the instrument. If the holder elects to demand payment of the last indorser first, it becomes the latter's duty to meet his obligation and his right, on doing so, to look to prior indorser for re-payment of the amount due thereon.

Bank of America v. Wilson, 186 Mass. 214.

Liability of officers indorsing.—Where officers and stockholders of a corporation indorse, as officers and individuals, a note made by the corporation they are not liable as a matter of law in the order in which they indorse. The circumstances raise a question of fact as to whether it was not the intention of the parties to become jointly liable as sureties.

Strasburger v. Myer Strasburger & Co., 152 N. Y. Supp. 757, 167 App. Div. 198; *George v. Bacon*, 138 App. Div. 208.

Special agreement.—Such agreement need not be established by proof of a formal contract. It is sufficient if the surrounding circumstances indicate that the indorsements were made upon an understanding that all indorsers should participate in the liability. Thus where several parties indorsed a note to enable a stranded theatrical company to get home, and to give the instrument credit with the bank, so that all are equally benefited, a prior indorser who has been compelled to pay may maintain an action against a subsequent indorser for contribution.

George v. Bacon, 138 App. Div. (N. Y.) 208.

It was sufficient if it appeared, taking all the circumstances into account, that was the nature of the liability which, as between themselves, the parties intended to assume and did assume.

Weeks v. Parsons, 176 Mass. 570, 575; *Hagerthy v. Phillips*, 83 Me. 336; *Cook v. Brown*, 62 Mich. 473; *Trego v. Cunningham*, 267 Ill. 378.

The above rule has no practical application to accommodation indorsers, where neither of them has ever owned the paper and no transfer by indorsement has been made.

Easterly v. Barber, 66 N. Y. 433, 437.

The mere fact that the indorsers are accommodation indorsers is not sufficient to change the rule that prior indorsers are liable in solido to subsequent indorsers who have paid the note, but an express agreement is necessary to render them liable ratably as between themselves.

In re McCord, 174 Fed. Rep. 72; *McCarty v. Roots*, 62 U. S. 432; *Kelly v. Burroughs*, 102 N. Y. 93; *Egbert v. Hanson*, 34 Misc. 596; *Easterly v. Barber*, 66 N. Y. 433, 437.

Where several parties indorse a promissory note to enable a stranded theatrical company to get home and to give the instrument credit with a bank so that all are equally benefited, a prior indorser who has been com-

pelled to pay may maintain an action against a subsequent indorser for contribution.

George v. Bacon, 138 App. Div. (N. Y.) 208; Weeks v. Parsons, 176 Mass. 570, 575; Haggarty v. Phillips, 83 Maine 336.

Parol evidence.—The true intention of indorsers—as between themselves—can be shown by oral evidence.

4 Am. & Eng. Ency. of Law (2d ed.) 492; Guild v. Butler, 127 Mass. 386; Cady v. Shepard, 12 Wis. 639; Witherow v. Slayback, 158 N. Y. 649; Haddock v. Haddock, 192 N. Y. 513; Noble v. Beeman, 65 Ore. 93; 1 Am. & Eng. Ency. Law, (2d ed.) 356.

In an action by an indorser of a promissory note, who has paid the same, against a prior indorser, it is competent to prove by parol that all the indorsers were accommodation indorsers, and by agreement they were, as between themselves, co-sureties.

Easterly v. Barber, 66 N. Y. 433.

As between the original parties, the apparent rights of the indorser on the face of the note and the contract of indorsement may be qualified and changed by parol evidence, and the intention of the parties established by showing the facts and circumstances of the transaction.

Witherow v. Slayback, 158 N. Y. 649; Good v. Martin, 95 U. S. 90; Patch v. Washburn, 82 Mass. 82; Breneman v. Furniss, 90 Pa. St. 186.

The burden of proof is on the plaintiff to show the alleged agreement.

Goldman v. Goldberger, 208 Fed. 879.

In an action brought on behalf of one indorser of a note against one of two other indorsers, the defendant may be allowed to show that the indorsements were for accommodation, and that by an oral agreement among the indorsers his liability in no event was to exceed one-third of the amount at any time due on the note; and if such an agreement is proved, his liability is governed thereby, irrespective of the order in which the indorsers signed the note.

Shea v. Vahey, 215 Mass. 80; Lewis v. Monahan, 173 Mass. 122.

Evidence is admissible to show that, at the time of an indorsement of a note, the first and second indorsers agreed that in case of a loss they should bear it jointly.

Ross v. Espy, 66 Pa. St. 481; 5 Am. Rep. 394.

\$ 3428	New York, N.Y. June 1 1901
at 4 months	After date of promise to pay to
the order of Columbia Bank	
Thirty four hundred seventy eight	Dollars
at Columbia Bank	
Value received with 6 %	Strassenberger & Co. Inc.
	Samuel Strasburger, Pres.
	Sarah Strasburger, Treas.

(INDORSED)

SAMUEL STRASBURGER
 SARAH STRASBURGER
 PATRICK HONGLEY

In the above illustration Strassenberger & Co., Inc., was in need of funds and issued its note to the Columbia Bank. The bank refused to discount it without the individual indorsement of the officers, which indorsement was made on the note. The corporation being unable to pay the note in full the Vice-President, who was the last indorser, paid the same and brought an action against the corporation and prior indorsers. There was no evidence of any express agreement between the parties with respect to the indorsement. Held, that under such circumstances the presumption arising from the order in which the names of the indorsers appear was officially overcome to raise a question of fact as to whether it was not the intention of the parties to become jointly liable as sureties for the corporation, and not liable to one another according to the order of their respective indorsements, and the plaintiff is in any event entitled to contribution from the Secretary and Treasurer to the extent of one-third of the amount she was obliged to pay.

Strassenberger v. Strassenberger & Co., Inc., 167 App. Div. 198.

§ 119. Liability of agent or broker. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen of this chapter, unless he discloses the name of his principal, and the fact that he is acting only as agent.

Variant.—The Illinois statute adds the following subdivision:

“Section 69a. Whenever any bill of exchange drawn or indorsed within this state and payable without the state is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice

being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable within the United States with or without suit, five per cent. damages in addition."

See Section 39.

Effect of wording of a letterhead as applying to section, see *Meridan National Bank v. Gallaudet*, 120 N. Y. 298.

ARTICLE 8**Presentment for Payment**

- Section 130.** Effect of want of demand on principal debtor.
- 131.** Presentment where instrument is not payable on demand.
 - 132.** What constitutes a sufficient presentment.
 - 133.** Place of presentment.
 - 134.** Instrument must be exhibited.
 - 135.** Presentment where instrument payable at bank.
 - 136.** Presentment where principal debtor is dead.
 - 137.** Presentment to persons liable as partners.
 - 138.** Presentment to joint debtors.
 - 139.** When presentment not required to charge the drawer.
 - 140.** When presentment not required to charge the indorser.
 - 141.** When delay in making presentment is excused.
 - 142.** When presentment may be dispensed with.
 - 143.** When instrument dishonored by non-payment.
 - 144.** Liability of person secondarily liable when instrument dishonored.
 - 145.** Time of maturity.
 - 146.** Time; how computed.
 - 147.** Rule where instrument payable at bank.
 - 148.** What constitutes payment in due course.

§ 130. Effect of want of demand on principal debtor. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Variant.—The Illinois statute has added after the word “liable” in the first clause the words “except in case of bank notes.” The Wisconsin statute omits that part of the first sentence after the words “on the instrument.” The words “and has funds here available for that purpose” appear in the New York, Kansas and Ohio statutes but are omitted in the statutes of the other states.

Neglect to present the check does not affect the debt for which it was given.

Greenwich v. Oregon Imp. Co., 76 Hun. 194, aff’d 148 N. Y. 758.

Practically the only risk assumed by the holder of a check in delaying presentment, so far as his rights against the drawer are concerned, is the insolvency of the drawee.

Springfield and Marine Fire Insurance Co. v. Tincher, 30 Ill. 399; *Binghamton Pharmacy v. First National Bank (Tenn.)* 176 S. W. 1038; *Hibernia National Bank v. Lacombe*, 84 N. Y. 367; *Martin v. Home Bank*, 160 N. Y. 190.

No formal presentation and demand is necessary in the case of notes which are owned by the bank where they are payable, and which are held by it ready to be delivered when paid.

Central Bank v. Stoddard, 83 Conn. 332; *U. S. Bank v. Smith*, 11 Wheat. 171.

No presentment at the place named is necessary to give a right of recovery against the maker. It only relieves him of interest and costs if he was ready at the time and place to pay it, and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact, and payment of the money into court, will be a bar to the recovery of interest and costs, but if after maturity the money is withdrawn and not brought into court the holder is then entitled to a judgment for the amount thereof with interest and costs.

Hills v. Place, 48 N. Y. 520; *Van Vliet v. Kanter*, 139 App. Div. (N. Y.) 605; *Farmers National Bank v. Venner*, 192 Mass. 534; *McKenney v. Whipple*, 21 Maine 98; 4 Am. & Eng. Ency. of Law, (2d ed.) 373; *Dewers v. Middle States Coal Co.*, 248 Pa. 202; *Bardsley v. Washington Mills*, 54 Wash. 557; *Parker v. Stroud*, 98 N. Y. 379; *Ceney v. Libby*, 134 U. S. 68; *Adams v. Hackensack*, 44 N. J. L. 638.

A promissory note payable on demand after date is due forthwith; and as between the maker and holder, an actual demand is not necessary.

Hyman v. Doyle, 53 Misc. 597; *McMullen v. Rafferty*, 89 N. Y. 457; *Church v. Stevens*, 56 Misc. 573; *Cottle v. Marine Bank*, 166 N. Y. 53, 59; *Farmers’ National Bank v. Venner*, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690; *Florence Oil, etc., Co. v. First National Bank*, 38 Colo. 119, 88

Pac. 182; *Citizens' Savings Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143; *Dominion Trust Co. v. Hildner*, 243 Pa. 253, 90 Atl. 69; *Deweese v. Middle States, etc., Co.*, 248 Pa. 202, 93 Atl. 958; 1 *Daniel Neg. Inst.*, Section 643; 3 R. C. L. 1174-1175; 7 Cyc. 965.

The holder of a bill due or presentable on Saturday may, at his election, rest upon a demand and presentment made before noon on that day, and if he does, notice of demand and protest given on that day or the next secular day is good, or he may elect to make a demand on Monday and if payment is not then made, in order to hold the indorser he is required to give notice of dishonor on that day.

Sylvester v. Crohan, 138 N. Y. 494.

The words "on demand" in a note do not make the demand a condition precedent to a right of action, but import that the debt is due and demandable, or at least that the commencement of a suit therefor is a sufficient demand.

Dominion Trust Co. v. Hildner, 243 Pa. 253; *First National Bank v. Story*, 200 N. Y. 350; *Field v. Sibley*, 74 App. Div. 81, affirmed without opinion 171 N. Y. 514.

Presentment to hold the drawer or indorser.—No cause of action against an indorser of a promissory note payable on demand at a place specified, until demand is made in compliance with the terms of the contract and due notice of non-payment. A demand by letter is insufficient.

Parker v. Stroud, 98 N. Y. 379; *Pierce v. Whitney*, 29 Me. 188; *Dan. Neg. Int. Sec.* 518; *Hartford Bank v. Green*, 11 Iowa 476; *Galbraith v. Shepard*, 43 Wash. 698; *Carroll v. Sweet*, 128 N. Y. 19; *Filler v. Gallantcheck*, 66 N. Y. Supp. 509; *Moore v. Alexander*, 63 App. Div. 100; *Hayward v. Empire Sugar Co.*, 105 App. Div. 21.

The fact that the indorser was secured by a mortgage did not dispense with the necessity of presenting the note for payment and notice of non-payment.

First National Bank of Binghamton v. Marlborough, 163 App. Div. (N. Y.) 72; *Seacord v. Miller*, 13 N. Y. 55.

Presenting a check for certification is not demanding payment.

Bradford v. Fox, 39 Barb. 203; *Simpson v. Mutual Life Ins. Co.*, 44 Cal. 139.

In *Union Bank v. Sullivan*, 214 N. Y. 333, it appeared that it was not intended by the parties to the note that the maker thereof should be primarily liable thereon as the principal debtor, but all of them, makers and indorsers alike, should stand behind the note "not separately but collectively," it was held that it was not necessary in order to charge the

indorsers that the note be presented for payment at any particular time or place.

See also, *Witherow v. Slayback*, 158 N. Y. 649; *Haddock v. Haddock*, 192 N. Y. 499.

The plaintiffs, indorsers of a note, and chargeable with knowledge of the residence of a prior indorser, gave erroneous information to the holder, a bank, to which they had indorsed it, whereby the prior indorser failed to receive notice of non-payment. Then they took up the note and brought their action against the prior indorser without further notice. Held, that though the bank might have recovered, the plaintiffs could not and that as against them was discharged.

Beale v. Parrish, 20 N. Y. 408.

A bank on crediting to a depositor the check of a third party drawn on another bank and indorsed by the depositor, assumes the obligation to present it for payment within a reasonable time, and if it omits to do so, and the check is dishonored through the failure of the bank on which it is drawn, both the indorser and drawer are discharged, and if the depositor, in ignorance of the facts, pays the amount of the check to his bank under his supposed liability as indorser, he has a good cause of action against the bank for the recovery of the money so paid by mistake.

Martin v. Home Bank, 160 N. Y. 190; *Carroll v. Sweet*, 128 N. Y. 19; *Dan. Neg. Int. Sec.* 1592; *Talbot v. National Bank*, 129 Mass. 67; *Williams v. Brown*, 53 App. Div. (N. Y.) 486.

The president and treasurer of a corporation, who indorses the note, is entitled to presentment and notice of non-payment in order to fix his liability, even though he knew of the insolvency.

Grandison v. Robertson, 231 Fed. 786.

The insolvency of the maker of a promissory note is not a sufficient excuse for failure to seasonably present the note in order to charge an indorser.

O'Neill v. Meighan, 32 Misc. 516.

Burden of proof.—The burden is on the holder of a note when seeking to hold an indorser, to prove due and timely presentment and the giving of notice of its dishonor. The obligation of the indorser is conditional upon all the steps having been taken by the holder which the statute has presented as to presentment, etc.

Commercial National Bank v. Zimmerman, 185 N. Y. 218.

In an action on a note payable at a specified place demand need not be averred or proved, and if the maker was ready and offered at the time and place to pay it, this is a matter of defense to be pleaded and proved by him.

Florence Oil Co. v. Bank of Canon City, 38 Colo. 120.

Presentment and demand of payment must be alleged in the complaint in an action against an indorser.

Jaffray v. Krauss, 79 Hun. 449.

Where a note is made payable "on demand and upon the return of security given" the making of a demand accompanied by a tender of the securities is not a condition precedent to the maintenance of an action to recover upon the note; it is sufficient for the plaintiff to produce and tender the note and securities upon the trial.

Spencer v. Drake, 84 App. Div. (N. Y.) 272.

Cases on the subject generally, see, Merritt v. Todd, 23 N. Y. 28; Pardee v. Fish, 60 N. Y. 268; O'Neill v. Meighan, 32 Misc. 516; Williams v. Brown, 53 App. Div. (N. Y.) 486; Martin v. Home Bank, 160 N. Y. 190; National Bank v. Mackey, 157 Ill. App. 409; Hough v. Gearen, 110 Ia. 240; Union Bank v. Sullivan, 214 N. Y. 312; Start v. Tupper, (Vt.) 69 Atl. Rep. 151; see also notes to Section 26.

§ 131. Presentment where instrument is not payable on demand. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Variant.—The Nebraska statute omits all of the last sentence after the word "issue." The Vermont statute the words "its issue in order to charge the drawer" are substituted for "the last negotiation thereof."

This section changes the law as interpreted in most of the states prior to its adoption, the courts having held that a note payable on demand was a continuing security on which the indorsers continued liable until an actual demand was made and the holder was not chargeable with, by reason of his failure to make a demand within a reasonable time.

Merrett v. Todd, 23 N. Y. 28; Isenlord v. Dillenbeck, 79 N. Y. 617; Syracuse, etc. R. R. Co. v. Collins, 57 N. Y. 651; Dimley v. McCullagh, 92 Hun. 454; Donlon v. Davidson, 7 App. Div. (N. Y.) 461; Crim v. Starkweather, 88 N. Y. 339; Buckhalter v. Second National Bank, 42 N. Y. 538; Darnell v. Moorehouse, 45 N. Y. 64; Smith v. Miller, 43 N. Y. 171; First National Bank v. Fourth National Bank, 77 N. Y. 320.

An informal request for the payment of a demand note, not accompanied by a presentment of it and not intended as a formal presentment

and demand, is not sufficient to put the note in dishonor so as to charge the indorser.

N. Y. National Bank v. Kennedy, 145 App. Div. 669.

The officers of a corporation who indorse in their individual capacity the note of their corporation, are indorsers entitled to presentment of the note for payment and note of non-payment.

Grandison v. Robertson, 231 Fed. 785.

What is reasonable time.—The intent of the section was to abrogate the former distinction between notes or bills, payable on demand and bearing interest, and those payable on demand merely. "In determining what is reasonable time, or unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business with respect to such instruments and the facts of the particular case," Sec. 4. The question whether a note or bill was presented within "a reasonable time" after its issue is, where the facts are ascertained and not in dispute, a question of law for the court, although the question, if the facts are unsettled, and the testimony conflicting, might be a mixed one of law and fact, which the jury should decide under the instructions of the court as to the law.

Commercial National Bank v. Zimmerman, 185 N. Y. 211.

The case of German-American Bank v. Mills, 99 App. Div. 314, which held the section is in effect a statute of limitations, and that the burden was upon the indorser of a demand note to plead and prove that presentment was delayed an unreasonable time, must be considered as overruled by

Commercial National Bank v. Zimmerman, *supra*.

What is "reasonable time" cannot always be measured by months. The authorities hold that as short a period as three months and as long a one as twenty-one months, has been held to be within a reasonable time, depending upon the special facts in each case.

German-American Bank v. Atwater, 165 N. Y. 36; Schlesinger v. Schultz, 110 App. Div. (N. Y.) 356; Citizens Bank v. National Bank, 135 Ia. 611; Becker v. Horwitz, 114 N. Y. Supp. 161.

In Columbia Banking Co. v. Bowen, 134 Wis. 223, the court said: "From the foregoing it seems plain that as regards the payee who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange, payable on demand, regardless of its character, put in circulation, so long as its circulating character is presumed may be outstanding without impairing the liability of the indorsers thereof. Formerly the length of time within which a

bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision of another."

One of the rules which has been established is, that where the drawer and drawee and the payee are in the same city or town, a check to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss, it falls not on him but on the holder.

Gordon v. Levine, 194 Mass. 421; *Natt v. Gans*, 114 Ala. 264; *Simpson v. Pacific Ins. Co.*, 44 Cal. 139; *Bickford v. National Bank of Chicago*, 42 Ill. 238; *Northwestern Coal Co. v. Bowman*, 69 Ia. 150; *Grange v. Reigh*, 93 Wis. 552; *Woodruff v. Plant*, 41 Conn. 344; *Carroll v. Sweet*, 128 N. Y. 19; *Kirkpatrick v. Puryear*, 93 Tenn. 409; *Parker v. Reddick*, 65 Miss. 242, 246.

A delay of two years before presenting a demand note for payment would ordinarily be unreasonable.

Hussey v. Sutton, 96 Misc. 552.

Many of the difficulties on the question of the time for presentment have arisen from anxiety on the part of the courts to adopt, in commercial cases, so far as practicable, fixed and certain rules as to what shall be considered reasonable diligence, so that the holders of commercial paper, and those who are contingently responsible for its payment, may be able to understand their several rights and duties in each particular case which may arise. For this purpose they have endeavored to settle, as a question of law, what, from its very nature, must in most cases be a mere question of fact. Without doubt each successive holder should either negotiate the instrument according to the usual course of business, or should cause it to be presented for acceptance and payment, and if he does neither the one nor the other, but locks it up for an unreasonable length of time, he should be deemed guilty of laches, discharging those who are contingently liable to him as drawers or indorsers. Nor may the ultimate presentment for payment be delayed beyond a reasonable time by successive transfers, any more than it may by being locked up or held an unreasonable time by the first or any successive holder. But if the instrument is kept in circulation, and not held an unreasonable time by any one holder, through whose hands it passes, it is difficult to assign any particular time in which it ought to be presented to the maker. Indeed it cannot be said that any particular time is reasonable or unreasonable in all cases, regardless of the usages of business, and the facts of the particular case. The object

in all cases is to require reasonable diligence on the part of the holder, and such diligence must be measured by the general convenience of the commercial world, and the practicability to accomplish the end required by ordinary skill, caution and effort. The question depends upon the particular facts and circumstances surrounding the parties, and all these matters should be considered in arriving at a solution of the question.

3 R. C. L. 1193; *Mohawk Bank v. Broderich*, 13 Wend. (N. Y.) 133; 27 Am. Dec. 192; *Parker v. Reddick*, 65 Miss. 242, 3 S. Rep. 575; *Pardee v. Fish*, 60 N. Y. 265; *Walch v. Dart*, 23 Wis. 334; *Merritt v. Todd*, 23 N. Y. 28; *State Bank v. Weiss*, 46 Misc. 93; *Schlessinger v. Schultz*, 110 App. Div. 356; *Sulzberger v. Cramer*, 170 App. Div. 114; *see also*, *Frazer v. Phoenix National Bank*, 161 Ky. 175; *Merritt v. Jackson*, 181 Mass. 69; *Manufacturing Co. v. Summers*, 143 N. C. 103; *Anderson v. Bank*, 144 Ia. 255; *Anderson v. Gill*, 79 Md. 312; *Beauregard v. Knowlton*, 156 Mass. 395; *Shutts v. Fingar*, 100 N. Y. 539; *Schlessinger v. Shultz*, 110 App. Div. (N. Y.) 356; Section 4 and notes.

Burden of proof.—The burden is on the holder of a note, when seeking to hold an indorser, to prove due and timely presentment.

Commercial National Bank v. Zimmerman, 185 N. Y. 218; *Merrett v. Jackson*, 181 Mass. 71; *Keyes v. Fenstermaker*, 24 Col. 329; *Bank v. Burgwyn*, 108 N. C. 62; *Savings Bank v. Moodie*, 135 Ia. 693.

Rule as to lost check.—It is the duty of the owner of a lost check, for the purpose of immediate presentment, to at once make substituted presentment and demand by means of a copy or sufficient description of the check, and in case of non-payment to give notice to the indorser.

Aebi v. Bank of Evansville, 124 Wis. 78; 1 *Parsons Notes and Bills*, 368, 448, 530; *Hinsdale v. Miles*, 5 Conn. 331.

Pleading.—In an action on a promissory note, an allegation that due notice of protest was duly given, is equivalent to an allegation that notice of presentment, demand, non-payment and protest was given. The term "protest" includes, in a popular sense, all the steps taken to fix the liability of an indorser upon the dishonor of commercial paper to which he is a party.

Sherman v. Ecker, 59 Misc. 217; 2 *Dan. Neg. Inst.* (5th ed.) Sec. 921.

§ 132. What constitutes a sufficient presentment. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;

2. At a reasonable hour on a business day;

3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

Subd. 1.—It is essential to the validity of a demand, that it shall be made by a person authorized to receive payment and deliver the instrument upon which it is founded, and the person upon whom it is made must then be afforded an opportunity, by immediate payment to performance, to protect himself from the consequence of a breach of contract.

Parker v. Stroud, 98 N. Y. 384; *Fowler Paper Co. v. Jones*, 183 Ill. 311.

The possession by an assumed agent of a promissory note payable to the order of the payee, and not indorsed by him, is not alone sufficient evidence of his authority to authorize a payment thereof to him.

Doubleday v. Kress, 50 N. Y. 410.

Subd. 2.—The defendant agreed to pay at a place stated and at a time stated, and, as he was to pay at a bank, so the time was necessarily limited to the hours within which the bank in the due course of its usual business was open to receive payment.

Osborn v. Rogers, 112 N. Y. 577.

A note, payable at a bank where the maker had no funds, was delivered after business on the date it became due to the teller, who was also a notary, at his dwelling, for the purpose of demanding payment. He went to the bank, and being unable to obtain entrance, demanded payment of himself at the bank door. Held, sufficient presentment to charge the indorser.

Bank of Syracuse v. Hollister, 17 N. Y. 46.

A presentment at a banker's out of the usual hours will be unobjectionable if the banker, or any agent on his behalf, were there at the time of presentment.

Bayl on Bills, 212; *Chit. on Bills*, 278; *Salt Springs Bank v. Burton*, 57 N. Y. 430; *Flint v. Rogers*, 15 Me. 67; *Waring v. Betts*, 90 Va. 46.

The maker of a promissory note has until the close of the banking hours, of the bank where the note is payable, in which to pay it, and if before the close of such hours he deposits the money in the bank, demands of payment earlier on the same day are premature, and the maker is not liable for protest fees and interest after maturity where his account was kept good until action brought and he thereafter immediately paid the amount due into court and pleaded tender, nor is he chargeable with costs of the action.

German Am. Bank v. Milliman, 31 Misc. 87; *Tiedman on Bills and Notes*, Sec. 121; *Planters Bank v. Markham*, 6 Miss. 397.

An averment that the note was presented at the maker's place of business and that "payment was then and there duly demanded" and refused, held equivalent to an averment that the note was presented within usual business hours.

Wallace v. Crilley, 46 Wis. 577; see also, *Schlessinger v. Schultz*, 110 App. Div. (N. Y.) 356.

Subd. 3.—Presentment is made at a proper place where a place of payment is specified in the instrument and it is there presented.

Section 133. *Hutchinson v. Crutcher*, 98 Tenn. 421.

A demand of payment, at a place named, is an essential part of the contract so far as the indorser is concerned, and no right of action accrues to the holder until after demand has been made in strict compliance with the terms of the contract and due notice given of the default.

Parker v. Stroud, 98 N. Y. 379.

The addition to a promissory note payable generally of words specifying a particular place of payment is a material alteration of a contract which of itself discharges the indorser.

Woodworth v. President Bank of America, 19 Johns, 391.

A demand at the place of business designated by the maker, of a person who represents himself to be the maker is *prima facie* sufficient.

Hunt v. Maybee, 7 N. Y. 266.

Where a note is dated at a certain place and is made payable at the First National Bank, presentment should be made at the First National Bank at that place.

Finch v. Calkins, 183 Mich. 298; 149 N. M. 1037; *Bailey v. Birkhofer*, 123 Iowa 59; see also notes under Section 133.

Subd. 4.—A demand made over the telephone on the maker is not sufficient. Presentment of the note and demand must be made by actual exhibition of the note. While it may not be necessary to actually produce the note if the maker refuses to pay it, it must be there at the place for presentment, otherwise the presentment is insufficient.

Gilpin v. Savage, 201 N. Y. 167, reversing 132 App. Div. 948.

Evidence to prove "absent or inaccessible" see, *In re. Poole*, 116 N. E. (Mass.) 229; *Haney v. Donnelly*, 12 Gray 361.

§ 133. Place of presentment. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Subd. 1.—Where a note is made payable at a branch office of a trust company, presentment at the central office is not sufficient to charge the indorser.

Iron Clad Manufacturing Co. v. Sackin, 129 App. Div. (N. Y.) 555; *Brooks v. Higby*, 11 Hun. 235.

Schlesinger v. Schultz, 110 App. Div. 358; *Baer v. Hoffman*, 150 App. Div. 474; see notes under Section 132, Subd. 3.

A demand of payment, at the place named, is an essential part of the contract so far as the indorser is concerned, and no right of action accrues to the holder until after demand has been made in strict compliance with the terms of the contract.

Parker v. Stroud, 98 N. Y. 379; *Gilpin v. Savage*, 201 N. Y. 170; *Smith v. Poillon*, 87 N. Y. 594; *Adams v. Leland*, 30 N. Y. 309.

It is competent for all parties to a note to agree orally, that the note shall be payable at a particular place, so far as to make a demand of payment there sufficient to bind the indorser.

Meyer v. Hibsher, 47 N. Y. 265.

Presentment through the clearing house is sufficient.

Columbia Knickerbocker Trust Co. v. Miller, 215 N. Y. 197.

Presentment at the "place of payment" means presentment at the place named, not merely presentment to the individual, corporation or institution.

Iron Clad Mfg. Co. v. Sankin, 129 App. Div. (N. Y.) 555.

Subd. 2.—Where nothing appears to the contrary, a note is presumed to have been made at the place where it bears date, consequently a note dated "Hornell, N. Y.," and payable at "The First National Bank," may be presented for payment at the First National Bank of Hornell, New York.

Finch v. Calkins, 149 N. W. 1037; 183 Mich. 300; *Baily v. Birkhofer*, 123 Iowa, 59; *Hazard v. Spencer*, 17 R. I. 561.

Although the date of a note does not make it payable at that place, still the date may, in one respect, be very important. It raises a presumption that the maker resides there, although it is only a presumption.

3 Kent, 96, 97; *Lowery v. Scott*, 24 Wend. (N. Y.) 358, 35 Am. Dec. 627; *Galpin v. Hard*, 3 McCord (S. C.) 394, 15 Am. Dec. 640.

Where no place of payment is named in a promissory note, demand at the usual place of business of the maker, though he be absent is sufficient, or at his residence; or to him in person.

Holtz v. Boppe, 37 N. Y. 634; *Baumgartner v. Reeves*, 35 Pa. St. 251; *Sulzberger v. Bank*, 86 Tenn. 201; *Oxnard v. Varnum*, 111 Pa. St. 193.

Subd. 3.—The rule requiring a demand of payment to be made personally upon the maker at his residence or place of business, is satisfied if due and reasonable diligence is used to ascertain such residence or place of business, without success; and the note may then be protested for non-payment so as to charge indorsers.

Holtz v. Boppe, 37 N. Y. 634.

The holders of a note which, under this Sub-division might properly be presented at the usual place of business or residence of the maker, went to the maker's residence, and, finding the doors locked, went around a corner of the house, where they saw a man standing in a stable door about 400 feet away; an open field lying between. They and the man walked towards each other and met in the field, where demand for payment was made on him. There was nothing to show that the stable or the field belonged to the maker, or was used in connection with her residence. Her place of business across the street was not visited for the purpose of making demand. Held, that the facts did not show due diligence in making a demand.

In re Poole, 116 N. E. (Mass.) 227; *Demonst v. Burnham*, 133 Mass. 339; *Adams v. Wright*, 14 Wis. 408.

When a promissory note is not made payable at any particular place, and if the maker has no known residence or place of business, and on inquiry at his former place of business the holder was referred to the agent of the maker, who informed him they were "out west." Held, that this was equivalent to saying they were out of the state; and that due diligence had been used by the holder to ascertain where to demand payment.

Adams v. Leland, 30 N. Y. 309; *Foster v. Julien*, 24 N. Y. 28.

The holder of a note is bound to make use of all reasonable and proper diligence to find the maker, and demand payment where no particular place is appointed for such payment.

Talbot v. National Bank of Commonwealth, 129 Mass. 67; Sulzbacher v. Bank, 86 Tenn. 201; 6 S. W. 129; Oxnard v. Varnum, 111 Pa. St. 193.

See also, Baily v. Birkhofer, 123 Ia. 59; Strawberry Point Bank v. Lee, 117 Mich. 122; Cox v. National Bank, 100 U. S. 704; Clark v. Sargent, 111 Pa. St. 175.

Subd. 4.—Where a note is made payable at a certain locality, without designation of a particular place therein, if the maker has no place of business or residence in the place where it is generally made payable, if the holder of the note is within such locality, on the day of payment with the note ready to receive payment, that is sufficient to constitute a presentment and demand.

Meyer v. Hibsher, 47 N. Y. 265; Parker v. Kellogg, 158 Mass. 90.

Where at the time of the maturity of a promissory note given by a co-partnership, in which no place of payment is named, the firm has been dissolved by its bankruptcy, a demand of one of the former co-partners in person is sufficient to charge an indorser.

Gates v. Beecher, 60 N. Y. 518.

§ 134. Instrument must be exhibited. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Where notes, when due, were not at the place provided for payment, but were in a bank, and so were not only not in readiness for exhibition and surrender, but could not have been surrendered if payment had been offered at the due dates, there was no legal presentment for payment at the time and place specified in the notes; and, no waiver being pleaded or claimed, the indorser could not be held.

Greco v. Lo Monte, 162 N. Y. Supp. 982.

The acceptor has a right to see the bill before he determines whether he will pay or not. If he pays it he has the right to have it delivered to him for use as a voucher in his settlement with the drawer.

Vergennes v. Cameron, 7 Barb. 143.

“To render a presentment for payment sufficient, the instrument must be exhibited to the person from whom payment is demanded. This rule has been stated as follows: ‘No valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence.’ The right of such person to an actual

exhibition or production of the instrument may be waived by failing to ask for it, and refusing payment on other grounds."

Selover, *Neg. Ins.* (2d Ed.) Sec. 193. In support of the last sentence, see, *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518; *Waring v. Betts*, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890; *King v. Crowell*, 61 Me. 244, 14 Am. Rep. 560; *Lockwood v. Crawford*, 18 Conn. 361; *Gilpin v. Savage*, 60 Misc. Rep. 605, 112 N. Y. Supp. 802; *Hodges v. Blaylock*, 161 Pac. (Or.) 396.

Presentment of a note and demand of payment must be made by actual exhibition of the instrument itself or, at least, the demand should be accompanied by some clear indication that the instrument is at hand ready to be delivered, and such must really be the case. While it may not be necessary to actually produce the note if the makers refuse to pay it, it must be at the place of presentment, otherwise the presentment is insufficient. Hence a demand over the telephone on the maker, at the place specified in the note is not sufficient.

Gilpin v. Savage, 201 N. Y. 167; 34 L. R. A. 417; *Legg v. Viman*, 165 Mass. 555; *Waring v. Betts*, 90 Va. 46.

Where the holder of notes did not have them with him at the time he demanded payment and therefore was not in a position to exhibit them if called on to do so, or to surrender them in case of payment, the demand was held insufficient to charge an indorser with liability.

Greco v. Lo Monte, 162 N. Y. Supp. 982.

An informal request for the payment of a demand note, not accompanied by a presentment of it and not intended as a formal presentment and demand, is not sufficient to put the note in dishonor so as to charge an indorser. Such informal demand, however, may have an important bearing on the question as to whether the note was actually presented for payment within a reasonable time.

State of N. Y. National Bank v. Kennedy, 145 App. Div. 669; *Congress Brewing Co. v. Hobenicht*, 83 App. Div. (N. Y.) 141.

Demand by telephone.—A demand by telephone on the maker of a promissory note is not sufficient presentment to charge the indorser, even though the person making the demand has the note in his possession at the time of such demand.

Gilpin v. Savage, 201 N. Y. 167; reversing 132 App. Div. 948; *National Bank v. Kennedy*, 145 App. Div. 669; *Parker v. Stroud*, 98 N. Y. 379.

Security to be tendered.—A demand on the maker of a secured note without offering to return his collateral, is insufficient to charge an indorser with liability.

Ocean National Bank v. Fant, 50 N. Y. 474.

§ 135. Presentment where instrument payable at bank.

Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Variant.—The Nebraska statute omits all of the section after the words “banking hours.”

The language of this section is taken almost word for word from the opinion of the Court of Appeals in *Salt Springs National Bank v. Burton*, 58 N. Y. 430.

Where a note by its terms is payable at a bank, it is sufficient if the note is there ready to be given up on payment should the promiser come to pay it. There is no necessity for the making of a specific or clamorous demand. If the promiser does not go to the bank and pay the note it is dishonored and it would be but a ceremony to take the note from the files and make a demand when there is no one on whom to make it.

Gilbert v. Dennis, 38 Am. Dec. 329; 3 R. C. L. 1206.

What are banking hours.—The plaintiff, who was a depositor in the defendant savings bank, was in the habit of drawing drafts against her account and for that purpose left her pass book at the bank. A by-law of the bank provided that the bank should be open for business daily from 10 A. M. to 3 P. M. The bank, however, was accustomed to open at 9 A. M. and to pay drafts before 10 o'clock. On one occasion, one of the plaintiff's drafts was presented and paid at 9:30 A. M. The plaintiff went to the bank for the purpose of stopping payment, but did not arrive there until 9:40, when she was informed that the draft had been paid. In an action by the plaintiff against the bank, it was held that the payment was valid. The by-law referred to, was merely a regulation for the convenience of the bank and its terms did not show that it was in any way meant for the protection of the depositors.

Butler v. Broadway Saving Institution, 177 App. Div. N. Y. 682.

The term banking hours must be reasonably construed.

Columbia Knickerbocker Trust Co. v. Miller, 150 App. Div. 817; affirmed 215 N. Y. 191.

In the case of *German-American Bank v. Milliman*, 31 Misc. Rep. (N. Y.) 87, where the holder of a note payable at a bank presented it during banking hours, and immediately protested it for non-payment, it was claimed, on behalf of the holder, that the presentment at any time during banking hours on the day of maturity was sufficient, and that

the note might be protested at once and the protest fees charged to the maker. It was held, the maker was entitled to the entire banking day in which to pay the note and that, if the note should be presented and dishonored and the maker should afterwards, and before the close of banking hours, deposit enough money to pay the note, the presentment would be premature. The maker could not then be charged with protest fees, nor with interest after maturity, nor costs, provided his account was kept good until the bringing of suit.

Bank of Utica v. Smith, 18 Johns 230.

Where a note is payable at a bank, it is sufficient presentment if the note is actually in the bank at maturity ready to be surrendered upon payment.

Dykman v. Northridge, 1 App. Div. 26, Affd. 153 N. Y. 662; De Vergne v. Globe Printing Co., 148 Pac. 922; Merchants' Bank v. Elderkin, 25 N. Y. 178.

What constitutes business hours of a bank, within the meaning of the section, has reference to the general custom at the place of the particular transaction in question. The courts of one state cannot take judicial notice of what constitutes reasonable hours in a foreign jurisdiction.

Columbia Banking Co. v. Bowen, 134 Wis. 219.

See also, Citizens Central National Bank v. New Amsterdam National Bank, 128 App. Div. 554; Merchants National Bank v. National Bank of the Commonwealth, 139 Mass. 513; Exchange Bank v. Bank of N. A., 132 Mass. 14; Manufacturers' National Bank v. Thompson, 129 Mass. 438; Schlessinger v. Shultz, 110 App. Div. 358; Bank of Syracuse v. Hollister, 17 N. Y. 46; Merchants Bank v. Spicer, 6 Wend. 443.

§ 136. Presentment where principal debtor is dead.
Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.

See notes Sec. 169.

The holder of a note, although excused for making presentment under this section, he is not excused from giving notice of dishonor to the indorser if he wishes to hold the latter liable on the note.

Reed v. Spear, 107 App. Div. N. Y. 146.

There must be a competent and legal proof of his death, and that the party upon whom the demand was made was such representative.

Weems v. Farmers Bank, 15 Md. 231.

Representatives of an estate must be given reasonable time to search for and examine the papers and evidences of the property of the deceased before he can be required to act in relation to any of them.

White v. Stoddard, 71 Am. Dec. 711.

§ 137. Presentment to persons liable as partners. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

This section makes no change in the law as interpreted before the adoption of the statute.

Gates v. Beecher, 60 N. Y. 519; Greenough v. Smead, 3 Ohio St. 415.

A demand upon one partner is sufficient because he represents the firm, and a dishonor by one is a dishonor by all, and each is presumed to have authority to act for the others.

Story on Prom. Notes, Sec. 255.

The same rule applies after a dissolution of the partnership.

Major v. Hawkes, 12 Ill. 298; Robbins v. Fuller, 24 N. Y. 570; Darling v. Marsh, 22 Me. 184; Fourth National Bank v. Henschen, 52 Mo. 207.

§ 138. Presentment to joint debtors. Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

To charge the indorser of a note of joint makers demand must be made on each.

Gates v. Beecher, 60 N. Y. 523; Britt v. Lawson, 15 Hun. 123; State of New York National Bank v. Kennedy, 145 App. Div. 671; Benedict v. Schineig, 13 Wash. 477; Davis v. Schmidt, 126 Wis. 461.

In the case Prior v. Simonson, 160 Pas. Rep. 1035, presentment was not made on one of the makers who was primarily liable and by reason thereof recovery could not be had against the indorser. This is not only the plain requirement of the section but the general rule of law as well.

7 Cyc. 1001; Shutts v. Fingar, 100 N. Y. 539; Benedict v. Schmeig, 93 Pac. (Wash.) 476; 36 L. R. A. 703; Nave v. Richardson, 36 Mo. 131.

The reason for the rule is well stated in Taylor v. Davidson, 2 Cranch, C. C. Fed. Cas. No. 13,769 as follows:

"It seems to me that the undertaking of the defendant in the present case, as indorser of the note, was that he would pay it if the makers of

the note did not, when payment should have been properly demanded of them. If either of them should pay it, the indorser would be discharged. He did not undertake that if either of the makers should refuse to pay it, he would; but that if all of them refused to pay it, then he would be responsible. Otherwise the greater the number of makers, the greater the risk he would run of being obliged to pay it in the first instance; for the holder might choose to demand it of the only insolvent among them. Upon general principles, then, I think that payment should have been demanded of each of the makers."

§ 139. When presentment not required to charge the drawer. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

See *Baldwin Bank v. Smith*, 215 N. Y. 76.

Want of funds in the hands of the drawee was no excuse for not presenting the bill, if the drawer had reasonable expectation to believe that it would be accepted and paid.

Knickerbocker Life v. Pendleton, 112 U. S. 696.

A firm gave a note which was indorsed by one of the partners. Shortly before its maturity the indorser consulted with the holder with reference to the making of an assignment by the firm and the partners for the benefit of creditors, stating that neither he nor the firm would be able to pay the note at maturity. Held, that there was an implied waiver of presentment.

In re *Swift*, 106 Fed. 65.

Presentment is excused where the making of the check was a fraud upon the part of the drawer, he having no funds in the bank, and no grounds for a reasonable expectation that it would be paid.

Beauregard v. Knowlton, 156 Mass. 396; *Case v. Morris*, 31 Pa. St. 100; *Foster v. Paulk*, 41 Me. 425; *Carson v. Fincher*, 138 Mich. 666.

§ 140. When presentment not required to charge the indorser. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

Variant.—The Illinois statute omits the last clause after the words "for his accommodation."

In *Union Bank v. Sullivan*, 214 N. Y. 342, the understanding and agreement was that they all, the maker and indorsers alike, should stand

behind the note, not separately but collectively. Under such circumstances presentment was not necessary to charge the indorsers.

Witherow v. Slayback, 158 N. Y. 649; *Haddock v. Haddock*, 192 N. Y. 499.

Where the indorser of a promissory note, at the time of its negotiation, promises the indorsee to look after the note, and when due makes a similar promise, presentment and notice of non-payment are waived.

Dillon v. Bron, 150 Pac. 553; *Markland v. McDaniel*, 51 Kan. 350; 32 Pac. 1114.

Where the indorsee of a note, made for his accommodation, knew that the payee would look to him for payment, and that the accommodation maker would not pay it, presentment was not necessary under the statute.

Belch v. Roberts, 177 S. W. 1062; see also, *McDonald v. Luckenbach*, 170 Fed. 434.

§ 141. When delay in making presentment is excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

See sec. 184.

The bank taking a check which on its face appeared to be overdue, on noticing the date, had inquired and ascertained that the drawer, had delivered the check on the day the bank received it, the apparent objection to the check would have been removed.

Cowing v. Altman, 71 N. Y. 442.

It is well settled that delay in the presentment of a check will relieve the drawer from liability, where he has been injured by the delay.

Carroll v. Sweet, 128 N. Y. 19; *Kramer v. Grant*, 60 Misc. 111; 7 Cyc. 977.

Delay in delivery of mail.—Judicial notice may be taken of the relative geographical locations and for the transportation of mail between the places.

Parks v. Dold Packing Co., 6 Misc. 5701; *Williams v. Brown*, 53 App. Div. 488; *Fitzpatrick v. Papa*, 80 Ind. 17; *Pearce v. Langfil*, 101 Pa. St. 507; *Walch v. Blatchley*, 6 Wis. 422, 70 Am. Dec. 469.

Where a note was mailed at the post office and through mistake was carried beyond its destination and not presented until two days after its maturity. Held, that the holder of the bill was not chargeable with a want of reasonable diligence.

Windham Bank v. Norton, 22 Conn. 214; Pier v. Heinrichoffen, 67 Mo. 163.

Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purpose of immediate presentment, defendant owed the duty to at once make substantial presentment and demand by means of a copy.

Albi v. Bank of Evansville, 124 Wis. 78; 1 Parsons Notes and Bills, 368, 448, 530, 2id. 260.

§ 142. When presentment may be dispensed with. Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this chapter can not be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied.

Subd. 1.—Failure of demand will not be excused by proof of the insolvency of the maker of the note.

Smith v. Miller, 52 N. Y. 554; Manning v. Lyon, 70 Hun. 345.

Where the drawee suspends payment within the time required for presentment, presentment and notice of dishonor are not essential in order to charge the drawer.

Grant v. MacNutt, 12 Misc. 20; Lovett v. Cornwell, 6 Wend. 369.

So also, where the drawee has no funds of the drawer wherewith to pay the check.

Brush v. Barrett, 82 N. Y. 400; Grant v. MacNutt, 12 Misc. 20; Dan. Neg. Int. Sec. 1596, 1597; Erchelberger v. Finley, 16 Am. Dec. 312.

So also, where the drawee becomes insolvent before the time of presentment elapses.

Syracuse, etc., R. R. v. Collins, 57 N. Y. 641; Planters' Bank v. Merritt, 54 Tenn. 177.

Where the maker of a promissory note within the state removes therefrom and continues to reside abroad until its maturity, the indorser may be charged without demand of such maker, or presentment at his place of residence within the state.

Foster v. Julien, 24 N. Y. 28.

See also, Reed v. Spear, 107 App. Div. (N. Y.) 149; Cohen v. Chelsea Exchange Bank, 164 Supp. 75.

Subd. 3.—The indorser of a promissory note may, before maturity, waive, either verbally or in writing, demand and notice of non-payment.

The waiver may result from implication or usage, or from any understanding between the parties which satisfies the mind that waiver was intended.

Cady v. Bradshaw, 116 N. Y. 188; Sheldon v. Horton, 43 N. Y. 93; 2 Dan. Neg. Inst. 143; Toole v. Crafts, 193 Mass. 111; id 196 Mass. 397; Annville Bank v. Kettering, 106 Pa. St. 531.

What facts will amount to a waiver is a question of law.

Wilson v. Huston, 13 Mo. 146.

The assent, however, must be clearly established, and will not be inferred from doubtful or equivocal acts or language.

Ross v. Hurd, 71 N. Y. 14; Cases cited under Sec. 182; King v. Nichols, 138 Mass. 18, 23; Torpey v. Tebo, 184 Mass. 307; Iowa Valley Bank v. Sigstad, 96 Ia. 491; Farmers Ex. Bank v. Altura, 129 Cal. 263; Torbert v. Montague, 38 Colo. 325.

A waiver of protest waives presentment and notice of dishonor as well as formal protest, but a waiver of notice of protest waives notice only and does not dispense with demand. Sec. 182.

Hall v. Crane, 213 Mass. 326; Drinkwater v. Tebbits, 17 Me. 16; Dan. Neg. Inst. (5th ed.) 1098.

Where prior to the maturity of a promissory note the maker, a corporation, was adjudged a bankrupt upon the written admission of insolvency by its president who was the indorser. Held, that this constitutes a waiver of presentment for payment and notice of dishonor.

O'Bannon v. Curran, 129 App. Div. (N. Y.) 92; Moore v. Alexander, 63 App. Div. 100.

But see, Reinke v. Wright, 93 Wis. 368.

Waiver may be implied from the actions of the drawer or indorser, it being a question of fact for the jury whether such acts amount to a waiver.

Bryant v. Wilcox, 49 Cal. 47; Bruce v. Lytle, 13 Barb. 163; Union Bank v. Magruder, 7 Peters 287; Boyd v. Bank of Toledo, 32 Oh. St. 526.

The waiver may be expressed in strict terms, or inferred from the words and acts of the party. The expression relied upon to show a waiver must have been made and intended for the benefit of the holder; if addressed to a stranger they are unavailing.

Burgettstown Bank v. Nil, 213 Pa. St. 456; Sheldon v. Horton, 43 N. Y. 93; Poultney Bank v. Lewis, 50 Vt. 622; Olendorf v. Schwartz, 5 Cal. 480.

In Bird v. Kay, 40 App. Div. 533 it was held, that evidence tending to show that the indorser of a promissory note waived presentment and notice of protest is not admissible in an action brought to charge him

upon his contract of indorsement, unless the facts constituting the alleged waiver are set out in the complaint.

Clift v. Rodger, 25 Hun. 39; Alleman v. Bowen, 61 Hun. 30; Baer v. Hoffman, 150 App. Div. 473; Galbraith v. Shepard, 43 Wash. 698.

It is only when, because of some act of the indorser, the non-payment by the maker and a failure of notice to the indorser cannot possibly operate to the injury of the latter that the omission is excused. The mere fact of insolvency of the maker is not enough. The fact which would excuse this presentation must be some act in which the indorser participated, by reason of which the knowledge of the fact that the maker would not pay the bill could be of no benefit to him.

Moore v. Alexander, 63 App. Div. (N. Y.) 100; O'Bannon v. Curran, 129 App. Div. 90.

§ 143. When instrument dishonored by non-payment. The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or can not be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

The maker of a promissory note has until the close of banking hours of the bank, where the note is made payable, in which to pay it, and if before the close of such hours he deposits money in that bank sufficient to cover the note, demand of payment (made by the holder) earlier on the same day are premature. He cannot thereafter be lawfully charged with fees of a protest made before the close of banking hours.

German-American Bank v. Central Bank, 31 Misc. 87; Mills v. Bank of United States, 11 Wheat. 431.

For the rule where the note is payable at a business place other than a bank, see Etheridge v. Ladd, 44 Barb. 69; McFarland v. Thorpe, 8 Cal. 626.

Subject generally, see Sections 121, 135; Planters Bank v. Markham, 6 Miss. 397; Osborn v. Rogers, 112 N. Y. 573; Hills v. Place, 48 N. Y. 520; Merchants Bank v. Elderkin, 25 N. Y. 178.

§ 144. Liability of person secondarily liable, when instrument dishonored. Subject to the provisions of this chapter, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

Justice Sutherland in 31 Misc. 96, in referring to this section said: "If Section 144 is to be construed as applying to notes payable at a bank, it might be argued with much force that the Legislature intended to permit an indorser to be sued on the day the note falls due, and even before the close of banking hours, provided an early demand be made. I hardly think that any such startling innovation was intended."

The indorser of a note, when his liability is fixed by notice and protest, becomes an independent and principal debtor, and does not stand to an indorser for value, in the position of a mere surety for the maker of the note.

German Am. Bank v. Niagara Cycle Co., 13 App. Div. 451; First National Bank v. Wood, 71 N. Y. 405, 411; Edw. Bills (3d ed.) Sec. 765.

While an indorser of a promissory note is said to be secondarily liable, the holder of a note may sue both the maker and the indorser, or either, and an indorser sued upon his contract of indorsement is absolutely liable thereon.

Curtis v. Atlantic National Bank, 215 N. Y. 397.

A bill or note does not lose its negotiable character by being dishonored. If originally negotiable it may pass from hand to hand *ad infinitum* until paid by the drawer, and the indorsement although made after dishonor, follows the nature of the original contract, and is negotiable unless it contains express words of restriction.

Leavitt v. Putnam, 3 N. Y. 494.

Where a negotiable promissory note has been protested for non-payment, and the liability of the indorsers thereof has been fixed by notice, such indorsers selling such notes without erasing their indorsement will be held responsible for the payment of the same, although no notice be given to them of its non-payment by the maker.

St. John v. Roberts, 31 N. Y. 441.

Guaranty.—If the agreement was an unconditional guaranty of payment, then the plaintiff's right of action on the guaranty was complete when the makers of the notes failed to pay according to the terms thereof.

Brown v. Curtis, 2 N. Y. 225, 227; Stein v. Whitman, 209 N. Y. 576.

The meaning of the guaranty depends upon the intention of the parties.

Hamilton v. Van Rensselaer, 43 N. Y. 244; Melnick v. Knox, 44 N. Y. 676; Catskill National Bank v. Dumary, 206 N. Y. 550; Bank v. Gay, 57 Conn. 224; Walker v. Forbes, 25 Ala. 139.

An agreement guaranteeing the "full, prompt, and ultimate payment" of notes and of "any and all renewals thereof or either of them," etc., as the words "full and prompt payment" would be inapt if all that the parties

intended was a guaranty of collection, the word "ultimate" was intended to include renewal notes and not to limit the guaranty to loans unpaid after diligent effort to collect, and the intention of the parties and effect of the agreement was an unconditional guaranty of the payment of the notes or renewals according to the terms thereof.

First National Bank of Litchfield v. Jones, 219 N. Y. 312.

FORM OF GUARANTY

.....19.....
For and in consideration of the sum of \$1, the receipt whereof is hereby acknowledged, the advancement of moneys, the giving and extending of credit by the.....Bank of.....to.....and of other valuable considerations, I hereby agree to pay or cause to be paid to the.....Bank all loans, drafts, overdrafts, endorsements, accounts, checks, notes, interests, demands and liabilities of every kind or description now owing or which may hereafter become due or owing by said.....to it whenever the same or any part thereof shall be due. All proceedings to collect from the principal debtor, or any one else, are expressly waived and I waive demand, notice and proceedings of every kind, and agree that the said bank may, without notice, surrender or release securities held by it and grant extensions of time to, and from time to time renew any obligations of said principal debtor without notice. This is a continuing guarantee.
(Seal)

§ 145. Time of maturity. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

Variant.—The statutes of Arizona, Kentucky and Wisconsin omit the last sentence beginning "Instruments falling due." The Colorado statute substitutes the following: "Instruments falling due on any day, in any place, wherein part of such day is a holiday, are to be presented

for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during any reasonable hours of the part of such day which is not a holiday." The Delaware statute omits the word "business" in second sentence. The Iowa statute has added a new subdivision as follows: "A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face." The Massachusetts statute (Laws of 1899, Chapter 130), has amended the section to read as follows: "On all drafts and bills of exchange made payable within this Commonwealth, at sight, three days of grace shall be allowed unless there is an expressed stipulation therefor to the contrary." The New Hampshire statute makes the same provision. The North Carolina statute adds the following: "All bills of exchange payable within this state, at sight, in which there is no expressed stipulation to the contrary, and not otherwise, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange, payable at the expiration of a certain period after date or sight; provided, that no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand." The Rhode Island statute adds the words "except sight drafts" after the word "instrument" in the first sentence. The statutes of Arkansas, Florida, Indiana, Kansas, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington add the words "becoming payable" after the words "instruments falling due." The New Hampshire and Massachusetts statutes use the words "or payable."

"All checks, bills of exchange or drafts appearing on their face to have been drawn upon any bank or individual banker carrying on banking business under the laws of this state, which are on their face payable on any specified day or in any number of days after the date or sight thereof, shall be deemed due and payable on the day mentioned for the payment of the same, without any days of grace being allowed, and it shall not be necessary to protest the same for non-acceptance."

Section 101, Banking Law, State of New York.

As the time when a bill matures manifestly relates to matters of performance, it is governed by the law of the place where the bill is payable, and not the law of the place where it is drawn or indorsed.

Bowen v. Newell, 13 N. Y. 290.

The rule as to presentment on Saturday is found in *Sylvester v. Crohan*, 138 N. Y. 494.

A note providing "On or before one year after date I promise to pay" matures one year after its date.

Third National Bank v. Bowman, 50 App. Div. (N. Y.) 66.

Negotiable instruments maturing on a holiday become payable on the day following.

Morel v. Stearns, 37 Misc. Rep. (N. Y.) 486.

§ 146. Time; how computed. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

The General Construction Law of the several states should be consulted in connection with this section; as to New York see, L. 1909, ch. 27; Sections 20, 24, 25.

A note payable on demand and a note payable on demand after date are, for the purpose of the running of the Statute of Limitations, deemed due and payable respectively on the day of the date of the note and on the day following without any demand.

Hardon v. Dixon, 77 App. Div. (N. Y.) 241; *McMullen v. Rafferty*, 89 N. Y. 456; *Crim v. Starkweather*, 88 N. Y. 339.

Where the term "month" is used and there is nothing to indicate a different meaning, it is construed as a calendar month, and in computing a calendar month the days are not counted but reference is made to the calendar. For example, a note dated July 1st and payable "three months after date" matures on the first day of October following.

Doyle v. First National Bank, 131 Ala. 294; *Roehner v. Knickerbocker Ins. Co.*, 63 N. Y. 163.

§ 147. Rule where instrument payable at bank. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Variant.—The Illinois and Nebraska statutes omit this section.

An acceptance of a promissory note payable at a bank is, if the party is in funds, that is, has the amount to his credit, equivalent to a check; and is in effect an order or draft on the banker, in favor of the holder for the amount of the note or acceptance.

Aetna National Bank v. Fourth National Bank, 46 N. Y. 82; *National Hudson Bank v. K. & H. R. R. Co.*, 17 App. Div. (N. Y.) 232.

A depositor who makes a note payable at a bank by implication authorizes the bank to pay the note and charge it to his account.

Aetna Bank v. Fourth National Bank, 46 N. Y. 82; *Baldwin Bank v. Smith*, 215 N. Y. 76; *Heinrich v. Bank of Middletown*, 164 App. Div. 960; 113 N. E. Rep. 531.

It is incumbent on the holder to secure payment, and loss resulting from his neglect should fall upon him, not on the drawer, who has no further duty to perform. I am unable to perceive why the same rule does not hold good in the case of a note payable at a bank where the maker has funds to meet it at maturity, especially since such a note is by statute made the equivalent of a check. To the extent that he has appropriated his credit, he is not called upon to look after it, but discharges his duty by keeping his account good. None of the cases in this jurisdiction holding that the maker of a note payable at a bank is not exonerated by the holder's failure to present it for payment involved the question of a loss resulting from such failure.

Baldwin Bank v. Smith, 215 N. Y. 80; see also, *Hills v. Place*, 48 N. Y. 522; *Stansbury v. Emberg*, 128 Tenn. 105.

The relation of debtor and creditor, not agent and principal, exists between a bank and its depositor.

Aetna National Bank v. Fourth National Bank, 46 N. Y. 82; *Jordan v. National S. and L. Bank*, 74 N. Y. 467; *Straus v. Tradesmen's National Bank*, 122 N. Y. 379; *Shipman v. Bank of State of N. Y.*, 126 N. Y. 318; *Cassidy v. Ultmann*, 170 N. Y. 505; *Burton v. United States*, 196 U. S. 283; *Taft v. Quinsigamond Bank*, 172 Mass. 363.

The money deposited becomes a part of the bank's general funds. The bank impliedly contracts to pay its depositor's checks, acceptances, notes payable at the bank, and the like, to the amount of his credit.

Citizens National Bank v. Importers and Traders Bank of N. Y., 119 N. Y. 195; *Nineteenth Ward Bank v. First National Bank of Weymouth*, 184 Mass. 49.

If maturing paper is left with the banker for collection, he becomes the agent of the holder to receive payment, but unless the banker is made the holder's agent by a deposit of the paper with him for collection, he has no authority to act for the holder.

Adams v. Hackensack, 44 N. J. L. 638.

A check presented for payment to the bank on which it is drawn is never paid by the mere receipt, presentation and retention of it, and is paid only by the transfer of credits, or by the actual delivery of the money, and turning it into a voucher by cancellation.

Mayer v. Heidelberg, 123 N. Y. 332; *Pratt v. Foote*, 9 N. Y. 463; *National Butchers and Drovers of N. A.*, 165 N. Y. 132; *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49; *Exchange Bank v. Sutton Bank*, 78 Md. 577; *Bank of the Republic v. Millard*, 10 Wall. 152; *Pollack Bros. v. Niall*, 137 Ga. 23; *Moore v. Meyer*, 57 Ala. 201; *Sutherland v. First National Bank*, 31 Mich. 230; *Moore v. Norman*, 52 Minn. 83; *Smith v. Mitchell*, 117 Ga. 772.

A bank is not bound to take notice of a memorandum or figures on check placed there by the depositor merely for his own information or convenience.

State National Bank v. Dodge, 124 U. S. 333.

Drawing check against insufficient funds.—In order to convict a person issuing a check against insufficient funds criminal intent must be shown. It is not necessary, however, to prove that the check was presented to the bank.

People v. Mohr, 109 Pac. 476; *People v. Weir*, 159 Pac. 442; *People v. Dilcher*, 38 Misc. 89; *People v. Lipp*, 111 App. Div. (N. Y.) 504.

Overdraft Payments.—The relation of banker and depositor is the relation of debtor and creditor. The depositor when he deposits money in a bank becomes the creditor of that bank and the bank becomes his debtor for amount of money deposited. The depositor is entitled to draw orders by checks, drafts or notes, for the payment of money, upon the bank, and the bank if indebted to the drawer of the order in an amount equal or in excess of that appearing upon the order, must pay it upon presentation for payment, and for any balance due the depositor the bank is the debtor for that balance.

When the depositor draws upon the bank in excess of the amount the bank is indebted to him, and the bank honors the order and pays it, such payment by the bank is a loan made to the depositor, and if the loan is not made good the bank may then sue for the repayment of the loan, upon the implied promise on the part of the person to whom the loan was made to repay the same.

On the other hand, when the bank is indebted to the depositor in an amount exceeding that appearing upon his order presented, the bank must pay if it the order is regular in all respects.

People's Bank v. Rhodes, 90 Atl. 409; *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281; *Citizens Central Bank v. New*

Amsterdam National Bank, 128 App. Div. (N. Y.) 554; National Bank of N. J. v. Berrall, 70 N. J. L. 757.

An "overdraft" by a depositor of a bank is in the nature of a loan made at the request of the depositor, and implies a promise to pay; and no allegation of a promise to pay is necessary in a complaint upon an overdraft due to the issuance of a New York draft which exceeded the balance in a depositor's account.

Becker v. Fuller, 164 N. Y. Supp. 495; Morse on Banks and Banking, 357; Middleton v. Rhoades, 90 Atl. 409; Hudson Trust Co. v. Chappelle, 108 N. Y. Supp. 1005.

The drawing of a check by a depositor in a sum greater than the amount which he has on deposit in itself implies a promise on the part of the depositor to repay to the bank the amount by which the account is overdrawn. It is usually held, however, that the bank is not entitled to interest on the amount of the overdraft until it has made a demand on the depositor for repayment and that interest runs from date of such demand. Owens v. Stapp, 32 Ill. App. 653. Hubbard v. Charlestown Branch R. R. Co., 52 Mass. 24.

Where the drawer's account is not sufficient to pay the check the bank is not supposed to make a partial payment.

Harrington v. First National Bank, 85 Ill. App. 212.

Stopping Payment.—The order to stop payment must be communicated to the bank before the check to which it refers has been paid.

Brandt v. Public Bank, 139 N. Y. App. Div. 173, 123 N. Y. Supp. 207; 32 B. L. J. 707.

A stop payment order, to be binding on the bank must accurately describe the check to which it refers.

Mitchell v. Security Bank, 147 N. Y. Supp. 470.

In the absence of a rule of the bank that stop orders must be in writing, a verbal notice is sufficient.

People's Savings Bank & Trust Company v. Lacey, 146 Ala. 688, 400 So. Rep. 346.

The certification of a check by the drawee bank terminates the drawer's right to stop payment.

National Commerical Bank v. Miller, 77 Ala. 168.

If a bank pays a check after payment has been stopped, it cannot charge the amount against the depositor's account.

German National Bank v. Farmers' Deposit National Bank, 118 Pa. St. 294, 12 Atl. Rep. 303; 32 B. L. J. 705.

As the rights and liability arising out of the failure of a bank to comply with an order stopping payment of a check, see Usher v. Tucker, 217

Mass. 441, 105 N. E. 360, L. R. A. 1916F, 826; American Defense Society v. Sherman National Bank, 176 App. Div. 250.

A bank which pays a check after payment has been stopped is responsible to the drawer, although the pass books of the bank contain a stipulation that while the bank will endeavor to execute stop orders, it "shall not be responsible for the execution of an order to stop payment."

Elder v. Franklin National Bank, 25 Misc. Rep. (N. Y.) 716, 55 N. Y. Supp. 576.

NOTICE TO STOP PAYMENT ON CHECK

To the.....Bank,

Dear Sirs:

Please stop payment on check No.....for \$.....
dated....., 19....., payable to.....
....., signed as follows:
"....."

The undersigned hereby agrees to reimburse you for all damages, cost and expense to which you may be subjected by reason of refusal to honor said check. (1).

(1). If desired, add "and to furnish due and sufficient security therefor whenever demanded."

Order in which checks should be paid.—Had the banks chosen to take up the checks in the order of their date and pay them as far as the drawer's money would go, who could complain. The holders of checks not paid would have no standing to make a demand from the bank.

Reinish v. Consolidated Bank, 45 Pa. Sup. Ct. 236; Mt. Sterling National Bank v. Green, 35 S. W. (Ky.) 911.

Drawer's death revokes check.—A check is not the assignment of the fund on deposit to the credit of the drawer pro tanto, and the holder is merely the agent of the drawer for the purpose of collecting it, and upon the death of the drawer before presentation the authority of the holder is revoked, and the bank is no longer authorized to pay; but on principles of necessity incident to the banking business, if the bank pays in good faith and without notice of the death of the drawer, it is protected.

Glennan v. Rochester Trust & Safe Deposit Co., 209 N. Y. 12, 102 N. E. 537, 52 L. R. A. (N. S.) 302; Ballach v. Frelinghuysen, 15 Fed. 675;

Stein v. Empire Co., 148 App. Div. 850; Citizens State Bank v. Cowles, 180 N. Y. 346; Weiland v. State Bank, 112 Ky. 310; Pullen v. Placer Co. Bank, 71 Pac. (Cal.) 83.

The same rule applies to a drawer after he is adjudged a bankrupt.

First National Bank v. Selden, 120 Fed. 212; La Clede v. Schuler, 120 U. S. 511.

For the rule in Massachusetts, see Laws of 1885.

§ 148. What constitutes payment in due course. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Where a note is surrendered to the maker in exchange for a worthless check, this does not constitute payment.

Hogan v. Kaiser, et al., 88 S. W. (Kas.) 1128.

Where a check was offered and received by the drawee bank as a deposit, credited to the depositor's account, and charged to the account of the drawer, the transaction constituted complete payment of the check, and could not be rescinded except for fraud or actual mistake.

American National Bank v. Miller, 185 Fed. 338.

Possession of a negotiable instrument is generally the sole adequate evidence of apparent authority to collect upon which the debtor has any right to rely, or can, without negligence, do so.

Boyd v. Lybrand, 113 Wis. 79; Joy v. Vance, 104 Mich. 97; Biggerstaff v. Marston, 161 Mass. 101.

A check for judicial purposes at least, cannot be regarded as having been paid unless the amount therein called for has been paid to the payee or to one authorized by him to receive the proceeds, that is to one authorized by the payee to indorse his name thereon.

Sigel v. Kovinsky, 93 Misc. 541, affirmed in 174 App. Div. 857.

The affirmative defense of payment is not established by verbal admissions resting solely on the testimony of interested parties; when the presumption of non-payment arising from possession of the note is fortified by positive testimony of non-payment.

Hoch v. Bernstein, 164 N. Y. Supp. 113.

ARTICLE 9.**Notice of Dishonor**

- Section 160. To whom notice of dishonor must be given.
- 161. By whom given.
 - 162. Notice given by agent.
 - 163. Effect of notice given on behalf of holder.
 - 164. Effect where notice is given by party entitled thereto.
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- 188. Effect of omission to give notice of non-acceptance.
- 189. When protest need not be made; when must be made.

§ 160. To whom notice of dishonor must be given.
Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

One of three indorsers of a note cannot have contribution from the others as co-sureties for their proportional share of the amount paid by him on the note, without showing presentment and notice, since he cannot by paying the note deprive co-sureties of their right to presentment and notice.

Bennett v. Kistler, 103 N. Y. Supp. 555.

Service of notice upon an antecedent party is not shown by the mere testimony of the notary that, not knowing the address of the indorser, he enclosed the notice of dishonor to a subsequent indorser with postage for forwarding the same to the prior indorser.

Fuller Buggy Co. v. Waldron, 112 App. Div. 814.

Where instrument has been dishonored a guarantor of a negotiable instrument becomes fixed with liability immediately upon default of the principal debtor; and failure upon the part of the holder to give notice of such default does not discharge the guaranty.

Marshall v. Hollingsworth, 166 Ky. 190.

Where a negotiable promissory note has been protested for non-payment and the liability of the indorsers thereof has been fixed by notice, such indorsers selling such note, without erasing their indorsements, will be held responsible for the payment of the same, though no notice be given to them of its non-payment by the maker. In such case the defendants are estopped by their acts from controverting their liability on the note, as indorsers thereof.

St. John v. Roberts, 31 N. Y. 441.

Where an indorser is dead, notice must be sent to his executor or administrator; and if no person has been appointed, or it cannot be ascer-

tained by the use of due diligence who or where he or they have been appointed can be found, notice must be forwarded to the last place of residence of the deceased. Hence the death of the indorser is no excuse for the neglect to give notice.

Parsons on Bills and Notes, 526; see also, *Bank of Jefferson v. Darling*, 91 Hun. 236; *Deining v. Miller*, 7 App. Div. (N. Y.) 409; *Reed v. Spear*, 107 App. Div. 144.

Where a check has been presented for payment and payment has been refused, notice of dishonor must be given to the drawer and each indorser.

Cassell v. Regier, 114 N. Y. Supp. 601; see Sec. 180.

An accommodation indorser is entitled to notice.

Bradley v. Buchanan, 21 Kans. 274; *Perry v. Taylor*, 148 N. C. 362.

The same is true even though they are the directors of the corporation by which the note was made.

Houser v. Tayssoux, 83 S. E. 672; *McDonald v. Luckenbach*, 170 Fed. 434; *Houser v. Payssoux*, 168 N. C. 1.

A bank holding an indorsed note for collection may give notice of its dishonor to all parties liable thereon, or only to its principal from whom it received the note, leaving the latter to notify in turn its principal or antecedent indorser, and so on down the line.

Gleason v. Thayer, 86 Conn. 248; *Bird v. State Bank*, 93 U. S. 96; 3 R. C. L. 622.

The holder of a bank check is entitled to an unqualified notice of its dishonor by the drawee before he is required, in order to hold an indorser, to notify him that payment has been refused.

Citizens Bank v. Bank of Pleasantville, 135 Ia. 605.

A bank which receives a note for collection from another bank may give notice either to all the parties or to the bank from which it received the note, which can then notify antecedent parties.

Gleason v. Thayer, 87 Atl. (Conn.) 790.

Where one contracts in the form of a guaranty upon the back of a promissory note, he cannot be made liable as an indorser, nor can he set up the defense of want of demand and notice of dishonor.

Brown v. Curtiss, 2 N. Y. 225.

The loss of a note does not excuse compliance with this section and Sections 167 and 174.

Klotz v. Silver, 127 N. Y. Supp. 1090.

The holder of a promissory note is presumed, in the absence of proof to the contrary, to know the person and residence of his immediate indorser.

Lawrence v. Miller, 16 N. Y. 235.

Merely looking in the directory for his address is not sufficient.

Bacon v. Hanna, 137 N. Y. 382.

A person, not otherwise a party, placing his name in blank upon the back of a negotiable note before delivery, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, is liable as an indorser and discharged therefrom upon failure of notice of non-payment and dishonor at maturity.

Perry Co. v. Taylor Bros., 148 N. C. 362.

Pleadings.—In an action on a promissory note, an allegation that due notice of protest was duly given to the defendants and each of them, is equivalent to an allegation that notice of presentment, demand, non-payment and protest was given to the defendants.

Sherman v. Ecker, 59 Misc. 216.

An action against an indorser should be dismissed where the complaint does not allege, nor the proof show, notice of non-payment to the indorser, such want of notice not being an affirmative defense which must be set up by the defendant.

Studebaker v. Tuerther, 123 N. Y. Supp. 118.

The complaint must allege that notice of dishonor was given, otherwise it is demurrable.

Ewald v. Faulhaber Co., 55 Misc. 275; Scanlon v. Wallach, 53 Misc. 104, Bennett v. Kistler, 163 Supp. 555.

In an action upon a bank check it is not necessary that the complaint should state that the notice of dishonor of the check was given to the drawer in a case where the drawer stopped payment of the check.

Scanlon v. Wallach, 53 Misc. 104; Goodwin v. Cobe, 24 Misc. 389.

But where the payment of the check was not stopped and the complaint does not allege notice of dishonor, it is demurrable for insufficiency.

Ewald v. Faulhaber, 55 Misc. 275.

In a complaint in an action on a promissory note against the indorsers, an allegation of notice to the indorsers of presentment, demand and non-payment is necessary, and an allegation that the note was protested for non-payment is not equivalent thereto.

Sherman v. Enker, 58 Misc. 456; Dan. Neg. Inst. (5th ed.) Sec. 921; Jaffray v. Krauss, 70 Hun. 449; Wisdom v. Bills, 120 La. 701.

In an action on a promissory note, an allegation that due notice of protest was given to the defendants and each of them, is equivalent to an allegation that notice of presentment, demand, non-payment and protest was given to the defendants.

Sherman v. Ecker, 59 Misc. 216.

§ 161. **By whom given.** The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

It is not necessary that notice should come from the person who holds the bill when it was dishonored, and it sufficeth if it be given after the bill was dishonored by any person who is a party to the bill.

West River Bank v. Taylor, 34 N. Y. 131; *Chetty on Bills*, 527.

The law is well settled that a demand or notice to be effective to bind an indorser, or discharge the maker or drawer paying to the person making it, must be by one having real or ostensible right to receive payment.

Hofrichter v. Enyhart, 99 N. W. (Neb.) 658; *West River Bank v. Taylor*, 34 N. Y. 128.

Notice by a stranger is not sufficient.

Lawrence v. Miller, 16 N. Y. 235; *Brailsford v. Williams*, 15 Md. 150; *Chanoine v. Fowler*, 3 Wend. 173.

Where the facts relative to the junior indorser's efforts to ascertain the address of the prior indorser are undisputed, the question whether he exercised reasonable diligence is a question of law.

University Press v. Williams, 48 App. Div. 188.

As to banks giving notice, see *Howard v. Ives*, 1 Hill, 263; *Sheldon v. Benham*, 4 Hill 129.

The presenting notary may give notice.

Smede v. Bank, 20 Johns, 372; *Dykman v. Northbridge*, 1 App. Div. (N. Y.) 26.

The maker of a note cannot give a valid notice of protest to an accommodation indorser, but may give such notice on behalf of a bank and as its agent.

Traders' National Bank v. Jones, 104 App. Div. (N. Y.) 436; *Cabot Bank v. Warner*, 92 Mass. 522; see Sections 162, 163. *First National Bank v. Gridley*, 112 App. Div. (N. Y.) 406.

§ 162. **Notice given by agent.** Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

See notes Sections 161, 163.

The holder of a promissory note is presumed to know the person and residence of his immediate indorser, and is bound to communicate

his information to any agent who may be employed to charge such indorser with notice of non-payment.

Lawrence v. Miller, 16 N. Y. 235.

The agent may give notice in his own name.

Drexler v. McGlynn, 33 Pac. (Cal.) 773.

A notice by a notary public by mistake signed with the name of the maker instead of his own name, without authority from the maker, is insufficient.

Cabot Bank v. Warner, 92 Mass. 522.

See also, Traders' National Bank v. Jones, 104 App. Div. N. Y. 436; Lawrence v. Miller, 16 N. Y. 238; Smith v. Poillon, 87 N. Y. 590; Eagle Bank v. Hathaway, 46 Mass. 212; First National Bank v. Gridley, 112 App. Div. 406.

§ 163. Effect of notice given on behalf of holder. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

The duty of the holder of a promissory note is discharged by notice to his immediate indorser, but if he is not satisfied with the responsibility of such indorser he should give notice to all the parties to whom he looks for indemnity.

West River Bank v. Taylor, 34 N. Y. 128; Linn v. Horton, 17 Wis. 153; Spencer v. Ballou, 18 N. Y. 327; Traders' National Bank v. Jones, 104 App. Div. 433.

§ 164. Effect where notice is given by party entitled thereto. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 165. When agent may give notice. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

Unless the agent gives notice to his principal in due time the latter is cut off, even though he used due diligence in sending notice to antecedent parties.

Russon v. Carroll, 90 Tenn. 90.

Where the plaintiffs, indorsers of a promissory note, deposited the same with the defendant bank for collection, and the bank on the dishonor of the note, not knowing the address of the prior indorsers, gave due notice of dishonor to the plaintiffs and enclosed with the notice to them a notice of dishonor addressed in blank to the indorser and bearing a two cent postage stamp, which latter notice the plaintiffs did not forward to the indorser: as the bank did what the law required it was not liable for negligence, and the failure of plaintiffs to collect from the prior indorser was due to their own negligence.

Brill v. Jefferson Bank, 159 App. Div. 461.

§ 166. When notice sufficient. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Variant.—The Kentucky statute omits the word “not” and substitutes the word “written” for “verbal” in the first sentence. The South Dakota statute omits the words “the notice” in the last sentence.

For case under Kentucky statute, see Grayson Co. Bank v. Elbert, 143 Ky. 750.

It is not necessary that the notice of dishonor contain a written signature. The notary's signature may be printed, as it fully acquaints the indorser of the dishonor of the note, as would the manuscript signature of a person whose handwriting he did not know, and it certainly is not expected that the indorser should know the handwriting of the notary.

Bank of Cooperstown v. Woods, 28 N. Y. 561.

Inartificial language, accompanied by omission to give the date of the making of a note, the date of its maturity and the name of the payee, does not invalidate a notice of protest.

Hermann Co. v. Bjurstrom, 74 Misc. 93.

Notice of dishonor of a promissory note erroneously addressed on its face to the maker, but sent by mail to and received by the indorser, is sufficient in the absence of proof that the indorser was misled thereby.

Wilson v. Peck, 66 Misc. 179; *Marshall v. Sonneman*, 215 Pa. St. 65.

A notice of protest, erroneous in some particulars in the description of the note protested, may be aided by evidence that there was no other note to which the notice could be applied.

Cayuga County Bank v. Warden, 6 N. Y. 19; *Bank v. Litchfield*, 9 N. Y. 279; *Second National Bank v. Smith*, 94 N. W. Rep. 664.

A notice of non-payment of a promissory note, not stating the maker's name, is not sufficient to charge the indorser.

Home Insurance Co. v. Green, 19 N. Y. 518.

The rule appears to be well settled that where a negotiable instrument has been permitted to go to protest, and the holder gives a notice of protest which contains a misstatement as to the time of dishonor, such mistake invalidates the notice, with the result that an indorser upon whom the defective notice is served will not be bound thereby. But where the indorser is not misled by a mistake in the notice as to the date of the dishonor, such mistake will not have the effect of rendering the notice invalid and discharge the indorser, as for example, where the mistake is apparent from the face of the notice, it being handed to the indorser before the date stated had arrived.

3 R. C. L. 1264; *Derham v. Donohue*, 155 Fed. 385.

See also, *Wilson v. Peck*, 121 N. Y. Supp. 344; *Marshall v. Sonneman*, 216 Pa. St. 65; 64 Atl. 874; *Howard v. Von Gieson*, 46 App. Div. (N. Y.) 79; *Hodges v. Shuler*, 22 N. Y. 114, 119; *Artisans' Bank v. Backus*, 36 N. Y. 100, 107; *Northup v. Cheney*, 27 App. Div. (N. Y.) 421; *Mills v. Bank of United States*, 11 Wheat. 431; *Gates v. Beecher*, 60 N. Y. 518; *Carter v. Bradley*, 19 Maine 62.

§ 167. Form of notice. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

Variant.—The Kentucky statute omits the words "or merely oral."

For case under the Kentucky statute, see *Grayson Bank v. Albert*, 143 Ky. 753.

While no precise form is necessary in a dishonor of a promissory note, yet the notice must reasonably apprise the party of the particular paper upon which he is sought to be charged. The note should be described in substance.

Home Insurance Co. v. Green, 19 N. Y. 518; *Derham v. Donohue*, 155 Fed. 385; *Brown v. Jones*, 125 Ind. 375.

It is not necessary that the notice should contain a formal allegation that the payment of a note was demanded at the place where payable. It is sufficient that it stated the fact of non-payment and that the holder looks to the indorser for indemnity.

Mills v. U. S. Bank, 11 Wheat. (U. S.) 431.

A notice to an indorser is not insufficient although it does not state at whose request it was given, nor who is the holder. It is of no consequence to the indorser, who is the holder, as he is equally bound by the notice, whosoever he may be, and it is time enough for him to ascertain the true title of the holder when he is called upon for payment. Again, a misnomer of the indorser in the notice will not vitiate it if in fact he knew it was intended for him. But reasoning that the most striking feature of a note is the name of the maker it has been held that a notice of dishonor is insufficient if it fails to specify the maker's name, although it states the date, amount and time of maturity of the instrument. The notice is sufficient if signed by a notary, and the notary's name may be printed instead of being affixed by him in his own handwriting. Under this section no signature at all need be appended to the notice.

3 R. C. L. 1266; *Derham v. Donohue*, 153 Fed. 386; *Home Insurance Co. v. Green*, 19 N. Y. 518; *Fulton v. Maccracken*, 18 Md. 528.

Notice to an indorser may contain more than is necessary, and more than is true, and yet be sufficient. It may contain less than the whole truth, that is less than what an exact copy of the note if sent to the indorser would give, and be good. This must necessarily be so, from the principal of law that no form of notice is prescribed, and that there is no general rule with regard to the notice other than the one already mentioned. Thus the omission of the date of the bill, the stating of a false date, or an inaccurate statement of the amount, is neither of them of course fatal to the notice as has been repeatedly held, if the notice be otherwise sufficiently full to give the needed information.

Gill v. Palmer, 29 Conn. 54; *Bank of Cooperstown v. Woods*, 28 N. Y. 546; *Cayuga Co. Bank v. Warden*, 6 N. Y. 19; *Derham v. Donahue*, 155 Fed. 179.

The essential facts to be stated in a notice of protest to bind the indorser are: (1) The note has not been paid at maturity. (2) It has been protested for non-payment. (3) The identification of the note.

Artisans' Bank v. Backus, 36 N. Y. 100; *Cayuga Co. Bank v. Warden*, 1 N. Y. 413; *Cook v. Litchfield*, 9 N. Y. 280; *Second National Bank v. Smith*, 118 Wis. 19.

A notice of dishonor need not state that the sender looks to the indorser, for payment as it may be inferred that the holder looks to the indorser and no other inference could reasonably be drawn from the notice.

Nelson v. First National Bank, 69 Fed. 798; Ransom v. Mack, 2 Hill (N. Y.) 587.

A notice of protest, dated the day a note is payable, and which states the names of the maker and indorser, and the amount, is sufficient to charge the indorser, unless circumstances exist which would render the information it was designed to give equivocal and uncertain.

Bank of Cooperstown v. Woods, 28 N. Y. 561; Youngs v. Lee, 12 N. Y. 551.

A notice of non-payment of a promissory note, not stating the maker's name, is not sufficient to charge the indorser.

Home Insurance Co. v. Green, 19 N. Y. 518.

An indorser's liability to recollect whether he received written notice of protest does not overcome the positive proof that such notice was written and mailed.

Herrman Lumber Co. v. Bjurstrom, 74 Misc. 93.

As the object of the notice is always to give information, if the required information actually reaches the party to be notified, it is sufficient however it may be communicated. Hence, whatever mode of service of notice may be adopted, if the notice actually comes to the indorser or drawer in due season, from the proper quarter and in proper form, it is valid and effectual.

3 R. C. L. 1257; Monarch Co. v. Farmers and Traders Bank, 105 Ky. 430; 49 S. W. 317.

Notice may be given by telephone if it be clearly shown that the party to be notified was really communicated with, that is, fully identified, as the party at the receiving end of the line.

Bank v. Fertilizer, 125 Tenn. 329; but see Mayer v. Boyle, 182 N. Y. Supp. 729.

A notice of protest signed by a notary public, and personally delivered by him to the indorser is not sufficient to charge the latter, where it appears that the notice was addressed to another person than the indorser, and stated that the holder looked to such person for the payment of the note.

Marshall v. Sonneman, 216 Pa. St. 65.

Where personal service of a notice is relied upon, the evidence must show either actual personal service or an ordinarily intelligent, diligent effort to make personal service upon the indorser, either at his place of business during business hours, or at his residence if he has no place of

business; but if he be absent, it is not necessary to call a second time, and notice may in that event be left with any one found in charge, or no one there, then the giving of notice is deemed to be waived.

Am. Exchange National Bank v. American H. V. Co., 103 App. Div. (N. Y.) 373; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 514; *N. Y. & A. Contracting Co. v. Telma Savings Bank*, 51 Ala. 305; *Williams v. Bank of U. S.*, 2 Pet. 96; *Reed v. Spear*, 107 App. Div. (N. Y.) 149.

§ 168. To whom notice may be given. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

A notice of protest of a draft may be served upon an agent of the payee and indorser of the draft, where the agent has authority to make and indorse drafts, and has authority to act and has acted as general agent of the payee.

Pearsons v. Kruger, 45 App. Div. (N. Y.) 187; *Scarborough v. City National Bank*, 157 Ala. 577; 48 S. Rep. 62.

Under this section a notice of protest of a bill of exchange indorsed by a bank may be addressed to its cashier.

Coffman v. Bank of Kentucky, 41 Miss. 212; 90 Am. Dec. 371.

In *Union Bank v. Stone*, 50 Maine 595, the notary testified that he was in the habit of delivering notices to S, and S testified that he was in the habit of delivering notices for the notary, and that he seasonably delivered to the parties to be notified all notices handed him for delivery, but had no definite recollections of doing so in the present instance. It was held, this testimony was sufficient.

McLean v. Ryan, 36 App. Div. (N. Y.) 281; *New Haven Co. Bank v. Mitchell*, 15 Conn. 206.

An incompleteness or inaccuracy in the address of a notice, either as to person or place addressed will be immaterial where it appears in evidence that the party charged actually received the notice.

Am. and Eng. Ency. of Law, 416; *Carter v. Bradley*, 36 Am. Dec. (Me.) 735; *Glickman v. Earley*, 78 Wis. 223.

Cases on the subject generally, see, *Am. Exchange Bank v. Am. H. V. Co.*, 103 App. Div. 372; *Reed v. Spear*, 107 App. Div. 149; *Mohlman v. McKane*, 60 App. Div. 547; *Fassin v. Hubbard*, 55 N. Y. 471.

§ 169. Notice where party is dead. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be

one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

A notice of non-payment of a note given in an informal way to an executor of a deceased indorser after a delay of eleven days, and to his co-executor to whom the party giving such notice was referred only after ten additional days have elapsed, where more than six weeks elapse before a formal claim is presented to the executors, will not sustain an action to enforce the liability of such indorser upon the note.

Deininger v. Miller, 7 App. Div. (N. Y.) 409.

Notice of demand and non-payment served upon one of several executors of a deceased indorser is sufficient to bind the estate.

Carolina National Bank v. Wallace, 13 S. C. 347; 36 Am. Rep. 694.

It has been held that if notice be sent to the last residence or last place of business of the deceased, it is sufficient to render his estate responsible, as it may reasonably be supposed that it will thus reach those interested in it.

Goodnow v. Warren, 122 Mass. 82; *Merchants' Bank v. Birch*, 17 Johns 25; *Linderman v. Guldin*, 34 Pa. St. 54.

Where an indorser of a note has died and the holder seeks to render his estate liable, in case the Surrogate's Court has not acquired jurisdiction of the estate, and no executor or administrator has been appointed, it is still the duty of the holder to use all reasonable diligence in order that those interested in the estate may be promptly informed of the demand. If notice be sent to the last place of residence or place of business of the deceased, it is sufficient to render his estate liable, as it may be reasonably supposed that it will reach those interested in it.

Goodnow v. Warren, 122 Mass. 79; *Merchants' Bank v. Birch*, 17 Johns (N. Y.) 25.

Cases on the subject generally, see *Mohlman v. McKane*, 60 App. Div. (N. Y.) 546; *Merchants' Bank v. Brown*, 86 App. Div. 599; *Reed v. Spear*, 107 App. Div. 144; *Bank of Port Jefferson v. Darling*, 91 Hun. 236; *Smally v. Wright*, 40 N. J. Law 471.

§ 170. Notice to partners. Where the parties to be notified are partners notice to any one partner is notice to the firm even though there has been a dissolution.

The admission by one of two partners who have indorsed a draft in the name of the firm, that the draft has been duly protested will not, if made after the dissolution of the partnership, be allowed to have the effect of proving notice as against the other indorser.

Bank of Vergennes v. Cameron, 7 Barb. 143.

A demand of payment of one is demand of all, and where there is a dissolution of the partnership before a bill falls due cannot vary the rule, nor render it necessary that a separate demand should be made of each.

Brown v. Turner, 15 Ala. 832; *Slocumb v. Lizardi*, 2 La. Am. 639; *Gates v. Beecher*, 60 N. Y. 518; *Seldner v. Mt. Jackson Bank*, 66 Md. 488; *Darling v. March*, 22 Maine 184; *Kershaw v. Kelsey*, 100 Mass. 561; *Fiengenspan v. McDonnell*, 201 Mass. 341; *Bank of St. Louis v. Altheimer*, 91 Mo. 191.

The service of notice upon an agent employed in liquidating the affairs of a partnership firm is good service, as such notice relates to those affairs.

Fassin v. Hubbard, 55 N. Y. 471.

In *Traders' National Bank v. Jones*, 104 App. Div. (N. Y.), it was held, that a notice served upon the firm of which Jones was a member, had the plaintiff alleged that Jones was such member, would alone be sufficient to charge Jones with the liability as indorser.

Gowan v. Jackson, 20 Johns 176.

One who indorses a promissory note in the name of a firm, cannot deny the existence of the firm in order to protect himself from liability.

Hubbard v. Matthews, 54 N. Y. 43.

There is a distinction between the case of a note of joint makers who are not partners and a note of partners. That distinction rests upon the fact that partners are but one person, in legal contemplation; that each partner, acting in such capacity, is not only capable of performing what all can do, and such acts necessarily bind them all, and all the partners are affected by the knowledge of one. These things do not apply to the relations of joint makers who are not partners. Hence a demand of one partner is equivalent to a demand of all; a demand of one of joint makers, not partners, is not.

Gates v. Beecher, 60 N. Y. 523; *Major v. Hawks*, 12 Ill. 298; see Sec. 171.

It has been held that if one of the members of the partnership resides at a distance and another at the place of residence of the party giving notice, notice should be given to the latter partner.

Hume v. Watt, 5 Kan. 34.

Cases on the subject generally, see *Rhett v. Poe*, 2 How. (U. S.) 457; *Gowan v. Jackson*, 20 Johns 176; *Hubbard v. Matthews*, 54 N. Y. 43; *Citizens Bank v. Hays*, 96 Ky. 365; *St. Louis National Bank v. Altheimer*, 91 Mo. 190.

§ 171. **Notice to persons jointly liable.** Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Distinction between parties jointly liable and partners, see Notes, Sec. 170; *Gates v. Beecher*, 60 N. Y. 523.

Where persons not partners indorse, each are entitled to notice, and upon failure to give such notice neither could be charged, because as to them each must have separate notice, and neither is liable without the other is so charged.

Willis v. Green, 5 Hill 232; *Shepard v. Hamley*, 1 Conn. 367; *Hubbard v. Matthews*, 54 N. Y. 50; *Boyd v. Horton*, 16 Wis. 495; but see, *Jarnagin v. Stratton*, 95 Tenn. 619; *Williams v. Paintsville Bank*, 143 Ky. 781; 137 S. W. 535.

§ 172. **Notice to bankrupt.** Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

In *Callahan v. Bank of Kentucky*, 82 Ky. 231, in discussion of this subject the court said: "The question has been heretofore undetermined in this state, and we are at liberty therefore to establish that rule which is in most accord with what we conceive to be the weight of authority and reason. We are satisfied, therefore, to hold the law to be that, whenever a general assignment is made, as contemplated by our law, the assignee in such assignment so far stands in the shoes of his assignor that notice to such assignee of the non-payment of the indorsed paper will bind the indorser."

American National Bank v. Junk, 94 Tenn. 624; *Casco Bank v. Shaw*, 79 Me. 376.

Due notice of non-payment is not excused, because the maker of a note was insolvent or bankrupt when the note was made and indorsed, and also when it fell due, although the fact was known to the indorser. This demand and notice the indorser has a right, in all cases, to insist upon; for this reason, that, upon payment by him, he may have his remedy over against the maker. And although the insolvency of the maker renders his remedy less valuable, it does not necessarily render it worthless. There are various degrees of insolvency, and it rarely happens that a man is totally insolvent, so that there is a chance of getting something by an application to the debtor. Besides, if a man has nothing of his own he

may have friends who, to relieve him from pressure, will do something for him. The indorser therefore has a chance of securing himself at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice is that notice could be of no use to the indorser. But it is almost impossible to prove that it might not have been of use.

Phillips v. Harding, 70 Fed. 468; *Leonard v. Olson*, 98 Ia. 162; *Farnum v. Fowle*, 12 Mass. 89; *Cook v. American Tube Co.*, 28 R. I. 41; 3 R. C. L. 1234.

Insolvency of a maker is no excuse for failure to notify the indorser of its dishonor.

Manning v. Lyon, 70 Hunn. 345; *Meise v. Newman*, 98 Hun. 428.

If the maker of a note becomes insolvent and is adjudged a bankrupt, the payee should present his claim in the bankrupt's estate and if he fails to do so, the indorsers are released, but only to the extent to which they suffer because of such failure, and a recovery may be had against them for the amount which would have remained unpaid had the claim been presented in bankruptcy and a dividend been allowed and received thereon.

Second National Bank v. Prewitt, 117 Tenn. 1; 9 L. R. A. 581.

§ 173. Time within which notice must be given. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter.

The maker of a promissory note has until the close of the banking hours, of the bank where the note is payable, in which to pay it, and if before the close of banking hours he deposits money in the bank sufficient to cover the note, demands of payment (made by the holder) earlier on the same day are premature. He cannot thereafter be lawfully charged with fees of protest made before the close of banking hours, nor with interest after maturity where the account was kept good until action brought and he thereafter immediately paid the amount into court and pleaded tender, nor is he chargeable with costs of the action.

German American Bank v. Milliman, 31 Misc. 87; *Etheridge v. Ladd*, 44 Barb. 69; *Merchants' Bank v. Elderkin*, 25 N. Y. 178; *Osborn v. Rogers*, 112 N. Y. 573; *Planters' Bank v. Markham*, 6 Miss. 397; *Mills v. Bank of United States*, 11 Wheat. 431.

The holder of a bill or note is entitled to give notice of dishonor immediately upon demand and non-payment. If the instrument is due at any hour upon the day of maturity, the holder may present it for payment and give notice of dishonor forthwith. But where the maker is entitled to the whole day in which to make payment, the notice should not be given until the conclusion of business hours. If an indorser receives notice

in due season that the note has been duly presented for payment and protested, the purpose of the law has been accomplished, although the holder of the note has not complied with one of the essential rules in regard to use of diligence in giving notice.

While the authorities are not agreed upon the proposition, it is held by the weight of authority, that the same diligence must be used in giving notice of dishonor to the indorser of overdue note as is required by the law merchant is notifying one who indorses before maturity.

3 L. C. L. 1246; King v. Crowall, 61 Mo. 244; Oakley v. Carr, 66 Neb. 751; 92 N. W. 1000; Stanley v. McElrath, 86 Cal. 449; 10 L. R. A. 545; Rosson v. Carroll, 90 Tenn. 90; 12 L. R. A. 727.

§ 174. Where parties reside in same place. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;

2. If given at his residence, it must be given before the usual hours of rest on the day following;

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Variant.—The Rhode Island statute amends subd. 2 to read: "2. If given at his residence it must be given before ten o'clock in the evening of the day following."

Subd. 1.—Service at the place of business must be made during business hours, but service at the residence will be sufficient if made during any hours when members of the household are attending to their ordinary affairs.

Adams v. Wright, 14 Wis. 409.

See also, Rosson v. Carroll, 90 Tenn. 90; Graul v. Strutzel, 53 Ia. 712; Bank v. Ezell, 10 Hun. 386; Patterson v. Todd, 18 Pa. St. 426; Cayuga County Bank v. Hunt, 2 Hill 237; Dan. Neg. Insts., Section 1038.

Subd. 2.—See Adams v. Wright, 14 Wis. 409.

Subd. 3.—Where the notary certifies that a notice of protest was mailed to an indorser in care of plaintiff, and there is no evidence that the defendant was at plaintiff's address, and the notice does not contain the reputed address of the defendant, and any presumption of diligence in

obtaining and mailing notice to the defendant is rebutted by the fact that three days after the protest she received notice mailed to her the day before its receipt.

Siegel v. Dubinsky, 56 Misc. 683.

A notice placed in a mail chute under the control of the postoffice department in the City of New York on the day of protest and postmarked the following day at noon will be presumed to have been delivered before the close of business on the day last mentioned, as required by this section.

Wilson v. Peck, 66 Misc. 179.

Where the holder does not actually know the indorser's place of residence, the notice may be addressed to the place where, after diligent inquiry, he is informed and believes he resides.

Requa v. Collins, 51 N. Y. 147; *University Press v. Williams*, 48 App. Div. 196.

§ 175. Where parties reside in different places. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

Whitewell v. Johnson, 17 Mass. 449; *Chick v. Pillsbury*, 24 Me. 458; *Sewall v. Russell*, 3 Wend. 276; *Sussex Bank v. Baldwin*, 2 Harrison (N. J.) 487; *Burgess v. Vreeland*, 24 N. J. L. 71; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Freeman's Bank v. Perkins*, 18 Me. 292.

These authorities, while not entirely harmonious, undoubtedly tend to sustain the rule that the notice must be sent on the next day by the first practical and convenient post.

In *Smith v. Poillon*, 87 N. Y. 597, the court said: "From a careful examination of the above authorities it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that a notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent,

and then it was held that when the parties lived in different places between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by most authorities in this state. What is practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the custom of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case."

Notice of dishonor of a bank check given by telegraph on the second day following the deposit of the check for collection and immediately after the depositor received notice of such dishonor is good, for under this section and Section 174, the bank had until the day following to give notice of dishonor, and by virtue of Section 178 the depositor had until the day following notice to him within which to notify antecedent parties.

Jurgens v. Wichmann, 124 App. Div. (N. Y.) 531.

Notice of dishonor is too late, where the notice with insufficient postage was deposited in the postoffice after ordinary business hours and the closing of mail on the business day succeeding dishonor, and was not again sent with sufficient postage until five days after its return by the postal authorities.

First National Bank v. Miller, 139 Wis. 126.

The general rule that notice of dishonor may be sent by mail to a drawer or indorser who resides in a different city or town from that in which the holder resides, is founded on the universal usage of all persons engaged in commercial and other business transactions to resort to the public post as a safe and certain medium of communication between places from and to which there is a regular transmission of the mail. If such were not the rule, and if it was necessary in order to charge a drawer or indorser either to give him personal notice of the dishonor of a bill or note, or to leave a notice at the place of his domicile, it is obvious that in many cases a very serious burden would be put on the holder of negotiable paper, and its free circulation beyond the limits of the domicile of the parties would become almost impracticable.

Shaylor v. Mix, 4 Allen (Mass.) 351.

The subject generally, see, *Strubbe v. Kings Co. Trust Co.*, 60 App. Div. (N. Y.) 549.

§ 176. When sender deemed to have given due notice.
Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

This section should be construed in connection with section 179 specifying "where notice must be sent."

It is a defense to an action against the indorser of a promissory note that notice of protest, mailed to him at a place he did not live and not at his last known address, was not received by him until many months after the note had been protested, and that plaintiff did not use reasonable diligence to ascertain defendant's address.

Albany Trust Co., 70 Misc. 598.

Proof of the non-receipt of the notice was competent on the question of whether there had ever been an actual mailing. Such proof would constitute a circumstance in which the proof as to the mailing was to be weighed and considered.

Union Bank v. Deshel, 139 App. Div. (N. Y.) 219.

Where the evidence shows that a notice of dishonor of a promissory note, sent to an address other than the one written by the indorser upon the note, was never received by the indorser, the notice was not "duly addressed" within the meaning of this section, and the indorser is entitled to judgment in her favor.

Century Bank v. Breitbart, 89 Misc. 308; Feigenspan v. McDonnell, 201 Mass. 341.

Where a notice of dishonor is mailed as required by law, the fact that it is not received is immaterial.

Board of Education v. Angel, 84 S. E. Rep. 747.

A notice of protest signed by a notary public and personally delivered by him to the indorser is not sufficient to charge the latter, where it appears that the notice was addressed to another person than the indorser, and stated that the holder looked to such person for the payment of the note.

Marshall v. Sonneman, 216 Pa. St. 65.

A notice is not on time where it is deposited with insufficient postage in the postoffice after ordinary business hours and after the close of mail on the first secular day following dishonor, and being returned by the postal authorities, is not again mailed with sufficient postage until five days thereafter.

Bank of Shawano v. Miller, 139 Wis. 126; 120 N. W. 820.

The burden of proof rests upon plaintiff to show a compliance with the statutory provisions in order to hold the indorser, as the liability of the indorser depends entirely upon compliance as to notice.

Bank v. Zimmerman, 185 N. Y. 210; *Robinson v. Aird*, 43 Fla. 30; *Bank v. Pezolat*, 95 Mo. App. 404, 69 S. W. 51; *Bank v. Watch Case Co.*, 187 Mich. 226.

For cases on the subject generally, see, *Du Pont Powder Co. v. Rooney*, 63 Misc. 344; *Cuming v. Roderick*, 28 App. Div. (N. Y.) 253; *Siegel v. Dubinsky*, 56 Misc. 681; *Bartlett v. Robinson*, 39 N. Y. 187; *Howard v. Van Gieson*, 46 App. Div. 77; *University Press v. Williams*, 48 App. Div. 189; *State Bank v. Solomon*, 84 N. Y. Supp. 976; *Requa v. Collins*, 51 N. Y. 145; *Vogel v. Starr*, 132 Mo. App. 430; *Bacon v. Hanna*, 137 N. Y. 382; *Pier v. Heinrichshoffen*, 67 Mo. 163; *Nolly v. Lyons*, 117 Ill. 244; *Carter v. Bradley*, 19 Me. 62; *Marshall v. Sonneman*, 216 Pa. St. 65.

§ 177. Deposit in post-office; what constitutes. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.

Delivery to a mail carrier while making his rounds has been held a deposit within the meaning of the section.

Pearce v. Langfit, 101 Pa. 507; *Wynen v. Schappert*, 6 Daly 558.

A mail chute is a letter box under the control of the postoffice department, and therefore equivalent to the postoffice itself.

Wilson v. Peck, 66 Misc. 180; *Casco National Bank v. Shaw*, 79 Me. 376, Atl. 67.

The deposit of a notice of dishonor of negotiable paper in a private letter box of a private office is not a deposit as required by this section.

Townsend v. Auld, 10 Misc. 343.

Where notice was deposited in a letter box in the bank from which the mail was accustomed to be collected by the mail carrier, it might be inferred in the absence of any evidence to the contrary that the notice had been sent.

Central National Bank v. Stoddard, 83 Conn. 339; *Hastings v. Brooklyn L. I. Co.*, 138 N. Y. 473, 478; *Whitney v. Moore*, 61 Vt. 230; 17 Atl. 1007.

For cases on the subject generally, see, *Bank v. Shaw*, 79 Me. 376; *Johnson v. Brown*, 154 Mass. 106; *Casco Bank v. Shaw*, 79 Me. 376; *Wood v. Callahan*, 61 Mich. 402.

§ 178. Notice to antecedent party; time of. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

The holder may give notice of dishonor to the indorser to whom he desires to look for the payment of the money, and it is then incumbent

upon him within the time specified after he receives the notice from the holder to give notice to those to whom he may wish to look for reimbursement. The operation of this section is not confined to those who are antecedent in liability as to the whole of the debt; but it applies to all who are antecedent as to any part of it. The indorsers know their relation to each other better than the holder, and the purpose of the act is to provide a uniform rule which the holder may follow in all cases as the rule was applied in the case of successive indorsers at common law.

Williams v. Bank, 143 Ky. 781, 137 S. W. 535; *Eaves v. Keeton*, 103 S. W. (Mo.) 632.

Service of notice upon an antecedent party is not shown by the mere testimony of the notary that, not knowing the address of the indorser, he enclosed the notice of dishonor to a subsequent indorser with postage for forwarding the same to the prior indorser.

Fuller Buggy Co. v. Waldron, 112 App. Div. 814.

Where the last indorser of a promissory note received notice of dishonor on Saturday, his notice to the next prior indorser is timely if served on the following Monday.

Oakley v. Carr, 92 N. Y. (Neb.) 1000, 60 L. R. A. 431.

Notice of dishonor of a bank check given by telegraph on the second day following the deposit of a check for collection and immediately after the depositor received notice of such dishonor is good, for under Sections 174 and 175 the bank had until the day following to give notice of dishonor, and by virtue of this section the depositor had until the day following notice to him within which to notify antecedent parties.

Jurgens v. Wichmann, 124 App. Div. 531.

Cases on the section generally, see, *Shelburne National Bank v. Townsley*, 102 Mass. 177; *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; *Stephenson v. Dickson*, 24 Pa. St. 148; *Williams v. Bank*, 143 Ky. 787; *Shea v. Vahney*, 215 Mass. 80.

§ 179. Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section.

If the holder goes further and attempts to add a particular address, he takes the risk that the address so given may be wrong, in which event the statute gives him no protection. *McGrath v. Matilda Francolini*, *Emil Mayer, et al.*, 156 N. Y. Supp. 980; *Du Pont de Nemour Powder Co. v. Rooney*, 63 Misc. Rep. 744, 117 N. Y. Supp. 220; *Ebling Brewing Co. v. Reinheimer*, 32 Misc. Rep. 594, 66 N. Y. Supp. 458; *Webber v. Gotthold*, 8 Misc. Rep. 503, 28 N. Y. Supp. 763; and perhaps also *Cuming v. Roderrick*, 28 App. Div. 253, 50 N. Y. Supp. 1053; *Id.*, 42 App. Div. 620, 58 N. Y. Supp. 1093; *Id.*, 167 N. Y. 571, 60 N. E. 1109.

Subd. 1.—The term residence as used in this section is not used in strict sense as necessarily implying a permanent, exclusive or actual abode in the place, but it may be satisfied by a temporary, partial or even constructive residence.

Wachusett National Bank v. Fairbrother, 148 Mass. 181.

The holder cannot rely upon the fact that the indorser's address is given in the directory as his place of residence.

McGrath v. Francolini, 92 Misc. 359.

Where the indorser of a note, residing in New York City, does not add his address to his signature, a notice of dishonor mailed to him addressed "New York City," is sufficient, though the notice is not received by the indorser. If the holder goes further and attempts to add a particular address, he takes the risk that the address so chosen may be wrong, in which event the statute gives him no protection.

McGrath v. Francolini, 92 Misc. 364, 156 N. Y. Supp. 980; *Webber v. Gotthold*, 8 Misc. 503. See also, *Mohlman v. McKane*, 60 App. Div. 546.

Notice mailed to an indorser of a note, directed to the city in which he has a place of business meets the requirements of this section.

Hussey v. Sutton, 96 Misc. 552.

The statute is mandatory. It provides that where the indorser has not added his address to his signature, the notice "must" be sent to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters. In such a case the burden is on the holder of the note to discover the "place of residence" and to send the

notice to the nearest postoffice. This appears to be the measure of "diligence" required by law (*Cuming v. Roderick*, 28 App. Div. 253, 256, 50 N. Y. Supp. 1053), but if the holder goes further and attempts to add a particular address, he takes the risk that the address so chosen may be wrong, in which event the statute gives him no protection (*Du Pont Co. v. Rooney*, *supra*; *Cuming v. Roderick*, *supra*). An indorser who has not designated his address at the time of his indorsement cannot justly demand that this additional risk of selecting the correct address be voluntarily assumed by the holder. The statute declares the latter's duty, while affording the indorser ample means of protection. If he omits to avail himself of that protection, the omission cannot well be remedied by an attempt to enlarge the holder's duties beyond the plain meaning of the law. Where the notice has been mailed as required by the statute, the liability of the indorser becomes fixed, although the notice may not be received by him.

Du Pont Co. v. Rooney, 63 Misc. Rep. 344, 346, 117 N. Y. Supp. 220; *Ebling Brewing Co. v. Reinheimer*, 32 Misc. Rep. 594, 66 N. Y. Supp. 458; *Webber v. Gotthold*, 8 Misc. Rep. 503, 28 N. Y. Supp. 763; *Bartlett v. Robinson*, 39 N. Y. 187; *Requa v. Collins*, 51 N. Y. 145; *Cummings v. Roderick*, 167 N. Y. 571; *University Press v. Williams*, 48 App. Div. (N. Y.) 188; *McGrath v. Francolini*, 92 Misc. 364; *Bacon v. Hanna*, 137 N. Y. 382; *Lankofsky v. Raymond*, 217 Mass. 99.

A notice addressed to the indorser at "New York" is insufficient where there is no evidence that he lived, ever had lived, or was sojourning in New York, and no inquiry was made to ascertain whether such was a fact.

Ponesca v. Hartman, 84 N. Y. 131.

Notice is sufficient if mailed to the indorser, at the place where the collecting agent believes he lives, although he does not live there and the holder knows his residence but fails to communicate it to the agent.

Bartlett v. Isbell, 31 Conn. 296.

Subd. 2.—In *Hussey v. Sutton*, 160 N. Y. Supp. 936, the defendant resided in the village of Akron and had his place of business at Buffalo. The notary's certificate of protest stated that the notice of protest was directed to the defendant at Buffalo, which notice was not received. Quoting this section the court held, there was proper notice.

See also, *Montgomery v. Marsh*, 7 N. Y. 482; *Scott v. Brown*, 240 Pa. St. 328.

The defendant indorsed a note, payable at 309 Broadway, New York City, where his attorney's office was located. The notary, who protested the note, sent a notice of dishonor intended for the defendant to that address. The defendant testified that he never lived, transacted business

or received his mail at the address mentioned. The notary was unable to state what steps he had taken to locate the defendant. It was held that the notice was insufficient.

Mechanic v. Elgie Iron Works, 163 N. Y. Supp. 97.

Subd. 3.—Although the residence or place of business is the usual and proper place for giving notice, it will be good if actually given anywhere.

Dicken v. Hall, 87 Pa. St. 380; *Eastern Bank v. Brown*, 17 Me 356; *Lowell Trust Co. v. Pratt*, 183 Mass. 379; *Citizens' National Bank v. Cade*, 73 Mich. 449.

Subd. 4.—Notice of dishonor by telegraph is good.

Jurgens v. Schulter, 124 App. Div. (N. Y.) 531.

Notice of dishonor of a promissory note erroneously addressed on its face to maker but sent by mail to and received by the indorser is sufficient in absence of proof that the endorser was misled thereby.

Wilson v. Peck, 66 Misc. 179.

§ 180. **Waiver of notice.** Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

The waiver may be either verbal or in writing, and it is not necessary that it should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. Before the maturity of a note, the defendant indorser called upon the plaintiff, who was the holder, and asked to have it extended another year. To this the plaintiff agreed, on condition that the defendant should let his name remain upon it and "let it be as it was." To this the defendant said yes. This was held to be a waiver of the indorser's right to a demand of payment and notice of non-payment thereof.

Cady v. Bradshaw, 116 N. Y. 188; *Gawtry v. Doane*, 48 Barb. 148; *Linthicum v. Caswell*, 19 App. Div. (N. Y.) 541; *First National Bank v. Weston*, 25 App. Div. 414.

An agreement at or before maturity of the note that an extension of time shall be given is a sufficient circumstance or fact to authorize an inference of waiver. *Daniel on Neg. Inst.* (4th Ed.) Section 1106; *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669; *Amoskeag Bank v. Moore*, 37 N. H. 539, 75 Am. Dec. 156; *Ridgway v. Day*, 13 Pa. 208; *Robinson v. Holmes*, 109 Pac. 754. Any act, course of conduct, or language of the indorser calculated to induce the holder not to make demand or protest or give notice, or to put him off his guard, or any agreement to that effect, will

dispense with the necessity of taking such steps. *Daniel on Neg. Inst.* (4th ed.) Section 1103; *Boyd v. Bank of Toledo*, 32 Ohio St. 526, 30 Am. Rep. 624; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Yaeger v. Farwell*, 13 Wall. 6, 20 L. Ed. 476. The contingent liability of an indorser is changed into a fixed liability by waiver of demand and notice. *Amoskeag Bank v. Moore*, *supra*.

Stephenson v. Brown, 147 Pa. St. 303.

The fact that an indorser of an instrument, waiving demand, notice and protest, could neither read nor write, beyond the making of his signature, is immaterial unless it appears that the indorsee was aware of the fact.

First National Bank v. Stolz, 183 S. W. (Mo.) 675.

A waiver must be made by one having the capacity to incur obligations, but, inasmuch as notice left with a clerk or party in charge of an indorser's place of business is sufficient, it follows that a waiver by a person so in charge is effective." 7 Cyc. 1124.

Ludington v. Thompson, 4 App. Div. 120.

A mere oral promise to renew a note, made after its maturity by an accommodation indorser, is not a waiver of the failure to give notice of dishonor; such promise is not an acknowledgement of liability.

Mechanics' Bank v. Katterjohn, 125 S. W. (Ky.) 1071.

A waiver must be clearly established and will not be inferred from doubtful or equivocal acts or language.

Ross v. Hurd, 71 N. Y. 14, 18; *Nevins v. Moore*, 221 Mo. 331; *First National Bank v. Gridley*, 112 App. Div. 405.

Where a bank in which an indorsed check had been deposited by the indorser, failed to give him due notice of dishonor, the indorser by giving his check to take up the dishonored check and receiving it, waived the giving of notice of dishonor under this section, and cannot thereafter maintain an action against the bank for negligence in failing to notify the prior parties of the dishonor of the check.

Weil v. Corn Exchange Bank, 63 Misc. 300.

The fact that the indorser was secured by a mortgage did not dispense with the necessity of presenting the note for payment and notice of nonpayment.

Seacord v. Miller, 13 N. Y. 55; *First National Bank of Binghamton v. Marlborough*, 163 App. Div. (N. Y.) 72; *Moore v. Alexander*, 63 App. Div. (N. Y.) 100.

Promise of payment by indorser, see, *Losee v. Allen*, 17 Misc. 275; *Sheldon v. Horton*, 43 N. Y. 93; *Brown v. Mechanics' Bank*, 16 App. Div. 207.

As to waiver by partners, see, *Miller v. Hackley*, 4 App. Div. (N. Y.) 117.

A waiver by the indorser of a promissory note of demand upon the maker is not a waiver of notice of the maker's default.

Hall v. Crane, 213 Mass.; *Burnham v. Webster*, 17 Maine 50.

If an indorser of a note, after the time for making a demand on the maker required to charge him as an indorser has expired without such demand having been made, signs upon the back of the note a waiver of "demand, notice and protest," knowing the facts which have released him from liability but in ignorance of their legal effect, such ignorance in the absence of fraud does not save him from the consequence of his waiver.

Toole v. Crafts, 193 Mass. 110.

A waiver may be express or implied. It is express when there is an agreement between the parties to the effect that the holder need not make a demand or give notice of dishonor; it is implied when the acts of the indorser communicated to the holder are such as to give the holder the right to believe that the indorser consents that there shall be no presentment and no notice of dishonor.

First National Bank v. Gridley, 112 App. Div. (N. Y.) 406; *Cayuga Co. Bank v. Dill*, 5 Hill 403; *Sheldon v. Horton*, 43 N. Y. 33; *Leary v. Miller*, 61 N. Y. 488; *National Hudson Bank v. Reynolds*, 57 Hun. 307; *Weil v. Corn Exchange Bank*, 63 Misc. 300.

Pleadings.—An allegation of a waiver, by an indorser of a promissory note, of notice of dishonor, contained in the complaint in an action brought to enforce the indorser's liability, is not sufficient unless it states the facts from which the implication of waiver relied upon may be deducted.

Congress Brewing Co. v. Habenicht, 83 App. Div. 141.

An allegation in the complaint that the indorsement was made with intent to give credit to the maker of the note, and that the note was delivered and accepted upon the faith of the indorsement, does not entitle the plaintiff to prove for the purpose of establishing such a waiver by the indorser, that the note was accepted upon the indorser's promise to treat it as his own paper and see that it was paid at maturity, if such a promise when made before the note was indorsed, was merged in the contract of indorsement.

Bird v. Kay, 40 App. Div. (N. Y.) 533; 4 Am. & Eng. Ency. of Law, (2nd ed.) 458.

§ 181. Whom affected by waiver. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

One who, in blank, indorses a note, is bound by waiver of presentation, protest and notice of nonpayment contained in the body of the note.

Phillips v. Dipbo, 93 Iowa 85; Dan. Neg. Inst. Section 1092; Bryant v. Lord, 19 Minn. 405; Bank v. Ewing, 78 Ky. 266.

A waiver of protest of a note by an indorser before maturity releases the holder from the necessity of making demand and of notifying the indorser of nonpayment.

Annville Bank v. Kettering, 106 Pa. St. 531.

A waiver written in the body of the instrument applies to the indorser as well as to the maker.

Savings Bank v. Haynes, 143 Ky. 534.

§ 182. Waiver of protest. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

See cases cited under Section 180.

A waiver of notice of protest waives notice only and is not a waiver of presentment, but a waiver of protest operates to waive presentment and notice of dishonor.

Atkinson v. Skidmore, 153 S. W. Rep. 457; Sprague v. Fletcher, 34 Am. Rep. 587; Lammert v. Guthrie, 111 Am. Rep. 561; Bank v. Hopson, 53 Conn. 453; Bank of Montpelier v. Lumber Co., 102 Pac. (Ia.) 685.

The term protest in a strict technical sense is not applicable to promissory notes. The word has by general usage acquired a more extensive signification and includes all those acts which by law are necessary to charge an indorser. When among men of business a note is said to be protested, something more is understood than an official declaration of a notary. The expression would be used to indicate a series of acts necessary to convert a conditional into an absolute liability.

Coddington v. Davis, 1 N. Y. 189.

Strictly speaking, the term "protest" applies only to foreign bills, but the custom to treat inland bills and notes in the same manner has become so nearly universal, that in common usage the term means the taking of such steps as are required to charge the indorser.

Annville Bank v. Kettering, 106 Pa. St. 531.

Where an indorser, at or before the time the note becomes due, says to the holder that arrangements for its payment are being made, and in direct terms or by reasonable implication requests the holder to wait or give time, this amounts to an assurance that it will be paid and that the promisor or indorser will pay it, and is a waiver of demand and notice.

It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place, and it would be contrary to good faith to set up such want of demand and notice—caused perhaps by such forbearance—as a ground of defense.

Bessenger v. Wenzel, 161 Mich. 61; 27 L. R. A. 516; 3 R. C. L. 1240.

See section 261 and notes.

Pleading.—In an action upon a promissory note the complaint alleged the making of the note by defendant, the indorsement thereof by the defendants, its due presentation for payment, a demand and refusal, and then added "Whereupon the said note was then and there duly protested for nonpayment, all of which the said Hammond (the maker) had notice." There was no averment that notice of protest was given to the indorser. Held, that the complaint was defective. The averment that the note was duly protested was not a sufficient allegation of notice to the indorser; and that the averment of notice to the maker tends to exclude the idea of an intention to aver notice also to the indorser.

Cook v. Warren, 88 N. Y. 37.

§ 183. When notice dispensed with. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

Reasonable diligence.—The law does not exact every possible exertion which might have been made to affect notice of dishonor of the paper.

Bank of Jefferson v. Darling, 91 Hun. 236; *Hobbs v. Strain*, 149 Mass. 212.

As to what constitutes reasonable diligence depends upon the circumstances of each case, and must be determined with reference to what would have suggested itself as necessary under the circumstances to the man of ordinary prudence and intelligence.

Brewster v. Schrader, 26 Misc. 486; *Crouse v. First National Bank*, 137 N. Y. 383; *Howland v. Adrian*, 29 N. J. Law 42; *Bank of Hartford v. Stedman*, 3 Conn. 494.

Whether sufficient diligence has been shown, the facts being undisputed, is a question of law.

Smith v. Poillon, 87 N. Y. 590; *Gawtry v. Doane*, 51 N. Y. 92; *Lawrence v. Miller*, 16 N. Y. 235; *Haly v. Brown*, 5 Pa. St. 178; *Brewster v. Shrader*, 26 Misc. 480; *Harris v. Robinson*, 4 How. (U. S.) 336; *Siegel v. Dubinsky*, 56 Misc. 681; *Vogel v. Starr*, 132 Mo. App. 430.

Merely looking in a directory, and not pursuing the inquiry any further, to ascertain the residence or place of business of a person to be

served with notice, is not diligent inquiry within the meaning of this section.

Greenwich Bank v. DeGroot, 7 Hun. 210; *Bacon v. Hanna*, 137 N. Y. 379; *Cuming v. Roderick*, 28 App. Div. (N. Y.) 257; *Gawtry v. Doane*, 51 N. Y. 84; *Requa v. Collins*, 51 N. Y. 114, 147.

By making no inquiry and merely mailing the notice to the indorser, in care of the maker, at the maker's street address, is not in compliance with this section and Section 179.

Du Pont Powder Co. v. Rooney, 63 Misc. 344; *McGrath v. Francolini*, 92 Misc. 367.

In an action against an indorser of a note, the notary's testimony that he mailed the notice of dishonor, the contents of which were not in the record, to the indorser at a certain address, and that he did not even know whether he looked for the indorser's address in a city or telephone directory, the indorser testifying that he never lived, did business, or received his mail at the address, did not entitle plaintiff to avail of this section.

Mechanic v. Elgie Iron Co., 163 N. Y. Supp. 97.

§ 184. Delay in giving notice; how excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

War an excuse.—*Woods v. Wilder*, 43 N. Y. 164; *Griswold v. Waddington*, 19 Johns, 438; *Morgan v. Bank of Louisville*, 4 Bush (Ky.) 82; *Harden v. Boyer*, 59 Barb. 425; *Polk v. Spink*, 98 Am. Dec. 426.

Disease an excuse.—*Tunno v. Lague*, 2 Johns, Cas. 1; *Dugan v. King*, 33 Am. Dec. 107.

Delay in mail an excuse.—The cessation of mails and of commercial intercourse generally is an excuse.

House v. Adams, 48 Pa. St. 261; 86 Am. Dec. 588.

§ 185. When notice need not be given to drawer. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. Where the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. Where the drawer has countermanded payment.

Subd. 1.—An order drawn by the president of a railroad corporation upon its treasurer, directing the latter to pay B or order a specified sum, stated as being the amount due B for work done by him as contractor on the railroad work, is in effect a promissory note and presentment and demand of payment are unnecessary.

Fairchild v. O. C. & R. R. Co., 15 N. Y. 337.

Subd. 3.—Where the drawer of a bill is a partner of the house or firm on which it is drawn, it is not necessary for the holder to prove that notice of its dishonor was given to the drawer.

Gowan v. Jackson, 20 Johns. 176.

Subd. 5.—In an action upon a bank check it is not necessary that the complaint should state that notice of dishonor of the check was given to the drawer in case the drawer stopped payment of the check, but it should contain an allegation that payment was stopped.

Scanlon v. Wallach, 53 Misc. 104; *Harker v. Anderson*, 21 Wend. 372; *Purchase v. Mattison*, 13 N. Y. Supp. 587.

§ 186. When notice need not be given to indorser.
Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation.

Subd. 1.—See notes subd. 3, Section 28.

As to the liability of an indorser of a void instrument, see *Bank v. Loomis*, 85 N. Y. 207.

An indorsement of negotiable paper is a warranty, by him who makes it, to every subsequent holder in good faith, that the instrument itself and all the signatures antecedent to such indorsement are genuine; and where

these signatures are forgeries, the indorser is at once liable upon his warranty to such subsequent holder without any presentment for payment or notice of nonpayment.

Turnbull v. Bowyer, 40 N. Y. 457.

Subd. 2.—Where a negotiable promissory note has been protested for nonpayment, and the liability of the indorsers thereof has been fixed by notice, such indorsers, selling such note without erasing their indorsement, will be held responsible for the payment of the same, though no notice be given to them of its nonpayment by the maker.

St. John v. Roberts, 31 N. Y. 441.

The purpose of giving notice is fully served when the indorser has actual knowledge of the dishonor and the law does not require the doing of a vain and useless act.

Electric Co. v. Hodge, 181 Mo. App. 234; see also, in re McGill, 106 Fed. Rep. (Oh.) 57.

Subd. 3.—If, as between the parties, the indorser is shown to be the principal debtor, the note having been made for his accommodation or, in other words, that he has no recourse against the maker, then it is not the strict contract of indorsement, and demand and notice are not necessary.

Witherow v. Slayback, 158 N. Y. 649; Ray v. Smith, 17 Wall. 415; Story on Promissory Notes, Section 268, 357; Blenderman v. Price, 50 N. J. L. 296.

If an indorser obtains a note to be discounted for his own benefit and accommodation, he is not entitled to notice, and so too, if he cannot be found after reasonable diligence.

Beale v. Parrish, 20 N. Y. 407.

A stockholder of a corporation, who indorsed before delivery, a note made by another corporation for the benefit of the corporation is not entitled to notice of dishonor, because the note was for his own benefit.

Mercantile Bank v. Busby, 113 S. W. (Tenn.) 390; Luekenbach v. McDonald, 164 Fed. Rep. 298.

§ 187. Notice of non-payment where acceptance refused. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

§ 188. Effect of omission to give notice of non-acceptance. An omission to give notice of dishonor by non-accept-

ance does not prejudice the rights of a holder in due course subsequent to the omission.

Variant.—The Wisconsin statute adds the following, “but this shall not be construed to relieve any liability discharged by such omission.”

§ 189. When protest need not be made; when must be made. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

See Sections 260, 268.

Formal protest of a promissory note by a notary public is not essential to hold an indorser. It is mere proof. What is essential is presentment and demand at the time and place provided for in the instrument, followed by notice to the indorser of such presentment, demand and nonpayment.

McBride v. Illinois National Bank, 138 App. Div. (N. Y.) 346.

While it is customary to protest a promissory note for nonpayment, yet such protest is unnecessary. All that is required is that the note shall be presented for payment, and notice of nonpayment given.

First National Bank v. Tustin, 246 Pa. 155.

Where a bill of exchange was indorsed by the drawers to a firm of bankers in the city of New York, who sent it to their agent in Vienna for collection, and such agent failed to demand payment thereof, in accordance with the laws of this state, and upon the refusal of the drawees to pay, failed to protest the same and give notice of such protest to the drawers in the manner required by the laws of this state, the latter are discharged from any liability thereunder, notwithstanding the instrument might have been under the laws of Austria, a mere “commercial order” for the payment of money of which no protest need be made.

Amsinck v. Rogers, 189 N. Y. 252.

It is not necessary, in order to charge an indorser of a promissory note which the maker failed to pay when it became due, to prove a formal protest by a notary; it is enough to prove that there has been proper demand upon the maker and a refusal by him to make payment, and that seasonable notice of these facts has been given to the holder.

Demelman v. Brazier, 198 Mass. 458; *Wisner v. First National Bank*, 220 Pa. St. 21.

Protest is not necessary in order to charge the maker of a note.

City National Bank v. Given, 87 S. E. 998.

ARTICLE 10**Discharge**

Section 200. Instrument; how discharged.

- 201. When persons secondarily liable on, discharged.
- 202. Right of party who discharges instrument.
- 203. Renunciation by holder.
- 204. Cancellation; unintentional; burden of proof.
- 205. Alteration of instrument; effect of.
- 206. What constitutes a material alteration.

§ 200. Instrument; how discharged. A negotiable instrument is discharged:

- 1. By payment in due course by or on behalf of the principal debtor;
- 2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
- 3. By the intentional cancellation thereof by the holder;
- 4. By any other act which will discharge a simple contract for the payment of money;
- 5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Variant.—The Illinois statute omits subdivision 4.

In view of this section it would seem plain that it meant that the particular method prescribed for the accomplishment of that result should exclude a discharge by any other, or different method, upon the familiar maxim that the express mention of one thing implies the exclusion of another.

Vanderford v. Farmers' Bank, 105 Md. 168; Union Trust Co. v. McGinty, 212 Mass. 205; Bradley v. Heyburn, 106 Pac. 170; State Bank v. Williams, 164 Ky. 143; Pease v. Syler, 78 Wash. 31.

Subd. 1.—A payment made to a holder of a promissory note by an indorser, not an agent for the maker but simply in discharge of his obligation as indorser, where the note was executed by the maker for value, does not inure to the benefit of the latter, and in an action upon the note he is liable for the whole amount thereof, notwithstanding the payment; so far as the payment relates to the maker's liability, it is simply an equitable purchase *pro tanto* by the indorser.

Madison Square Bank v. Pierce, 137 N. Y. 444; Cantrell v. Davidson, 180 Mo. App. 410.

When the maker of a note transferred to the payee money belonging to another and thereby obtained possession of the note and destroyed it, though the note was in form paid, the transaction was not in equity and justice a "payment in due course" by or on behalf of the principal debtor within the meaning of this section.

Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137.

As to the distinction between payment and sale see,

Lancey v. Clark, 64 N. Y. 209.

Payment must be in money.

De Meto v. Dagson, 53 N. Y. 635.

The payor is entitled to demand the surrender of the instrument.

Crandall v. Schroeppel, 1 Hun. 558.

The taking of a note, either of a debtor or a third person, for a precedent debt is no payment unless it be expressly agreed to take the note as payment and run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment.

Elwood v. Diefendorf, 5 Barb. 398; Ruhl v. Martens, 40 App. Div. (N. Y.) 232.

It is a general rule of law that when an instrument upon which several are liable, some primarily and some secondarily, if it is satisfied by him who is primarily liable, a complete discharge results. It no longer has legal existence.

Comstock v. Buckley, 141 Wis. 231; Snyder v. Malone, 102 N. W. 354; Northern Bank v. Cooke, 76 Ky. 340; Rich v. Goldman, 90 N. Y. Supp. 364; Spies v. National City Bank, 174 N. Y. 222.

When an indorser takes up a note after it has been dishonored is in effect a repurchase and not a payment of it, and the indorser retains all the former rights which he had against the prior parties.

Kelly v. Stead, 136 Mo. 430, 37 S. W. 1110; Cochran v. Wheeler, 7 N. H. 202, 26 Am. Dec. 732.

The maker of a promissory note can satisfy it only by payment to the owner at the time, or to such owner's authorized agent. If the recipient of the money is not actually authorized, the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. This rule applies generally to all negotiable paper, independently of the existence of any mortgage or other security.

Marling v. Nommensen, 127 Wis. 363; 115 Am. St. Rep. 1017; Harrison National Bank v. Austin, 65 Neb. 632.

As to payment through clearing house, see, National Union Bank v. Earle, 93 Fed. Rep. 330; Title G. & T. Co. v. Haven, 126 App. Div. (N. Y.) 802; Exchange Bank v. Ginn, 114 Md. 181; Boylston v. Bank of Richardson, 101 Mass. 287; Tradesmen's Bank v. Bank, 66 Pa. St. 435; People v. St. Nicholas Bank, 77 Hun. 159; Mt. Morris Bank v. Ward Bank, 172 N. Y. 244; National Bank Commerce v. Mechanics Bank, 148 Mo. App. 1; Columbia Knickerbocker T. Co. v. Miller, 215 N. Y. 191.

The burden of proof as to payment is on the maker.

Guano v. Marks, 135 N. C. 59.

Sub. 2.—The holder of a note with whom the indorser had deposited the full amount thereof as security for its collection may maintain an action against the maker.

People's National Bank v. Rice, 149 App. Div. (N. Y.) 18; Madison Sq. Bank v. Pierce, 137 N. Y. 444.

Subd. 3.—Where the holder of a promissory note voluntarily cancels the same, and surrenders it to the maker, this, although no consideration was paid, in the absence of fraud or mistake, operates in law as a release and discharge of the maker's liability.

Larkin v. Hardenbrook, 90 N. Y. 333; Albert v. Ziegler, 29 Pa. St. 50; Kent v. Reynolds, 8 Hun. 559; Wheeler v. Billings, 38 N. Y. 263; Barker v. Bradley, 42 N. Y. 316; Jaffray v. Davis, 124 N. Y. 164; Swartzman v. Post, 94 App. Div. (N. Y.) 474; Case v. Bridger, 133 La. 754; Van Auker v. Hombeck, 14 N. J. L. 178.

When the payee of a note tears it up, with the intention of destroying and cancelling it, this is a discharge of the note.

Montgomery v. Schwald, 177 Mo. App. 75.

Where an instrument or the signature thereto has been cancelled unintentionally or by mistake, it is no discharge.

Manufacturers' Bank v. Thompson, 129 Mass. 438.

If one of several joint owners of a bill or note surrenders the instrument to the maker or acceptor for cancellation, and be done without the knowledge or consent of the other owners, the transaction amounts to a conversion of the instrument and an action lies in favor of the defrauded owners against their joint owner.

Winner v. Penniman, 35 Md. 163; 6 Am. Rep. 385.

Subd. 4.—Where a negotiable instrument is materially altered without the assent of the parties liable thereon, it is avoided except as against a party who has himself made, authorized, or assented to such alteration. The same rule applying to any contract.

Bodine v. Berg, 82 N. J. L. 662, 40 L. R. A. 65.

Where plaintiffs surrendered to defendant the latter's notes upon promise to deliver jewels to plaintiffs in payment, and thereafter defendant refused to do so, plaintiffs could rescind agreement to accept the jewels and sue on the notes, and were not obliged to sue for damages for defendant's refusal to carry out his agreement.

Loeb v. Goldsmith, 163 N. Y. Supp. 1022.

Where a note was provable in bankruptcy, a letter to the holder stating that the maker would pay every dollar remaining unpaid upon the note, with interest, as soon as he sold a mill, constituted a new promise sufficient to remove the bar of the discharge in bankruptcy.

Herrington v. Davitt, 115 N. E. (N. Y.) 476.

Subd. 5.—Where the holder of a promissory note surrenders it upon the payment of part of the amount due thereon and promises to pay the balance of the indebtedness, the holder is precluded from subsequently maintaining an action against the maker upon the note to recover the balance thereof.

Schwartzman v. Post, 94 App. Div. (N. Y.) 474; Jaffray v. Davis, 124 N. Y. 164; Ellsworth v. Fogg, 35 Vt. 355; Larkin v. Hardenbrook, 90 N. Y. 333.

The words, "in his own right," merely excludes the case of a maker acquiring the instrument in purely a representative capacity as executor, administrator, guardian, etc.

It has been held that whether a note is paid by the taking of a new note or merely renewed depends upon the intention.

Flanigan v. Hambleton, 54 Md. 222; McElwee v. Lumber Co., 69 Fed. 302.

Where the original note was exchanged for a renewal note which was forged, the holder may maintain an action on the original note although it cannot be produced.

Bass v. Wellesey, 192 Mass. 192.

Where the maker of a promissory note induces the indorsee to pay it when due and thereafter in some way gets possession of it, not claiming that he paid it, or that it was delivered to him by the indorsee, never became the holder "in his own right." It requires more than possession of a note obtained by accident or design to extinguish the liability of the maker.

Korkemas v. Macksoud, 131 App. Div. 728.

The fact that a maker after maturity has possession of a note is *prima facie* evidence of its payment.

Weakley v. Mizell, 193 Ill. App. 484; *McCoy v. Purcell*, 110 N. E. (Ind.) 658.

§ 201. When persons secondarily liable on, discharged.

A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.

Variant.—In all the states except New York and Maryland the words "unless made with the assent of the party secondarily liable or" are inserted after the word "instrument" in Sub. 6.

The Illinois Statute substitutes for Subdivision 3—"By a valid tender of payment made by a prior party," and adds to Sub. 5 the words: "or unless the principal debtor be an accommodating party."

The Missouri Statute adds to the end of Sub. 3—"except when such discharge is had in bankruptcy proceedings."

The Wisconsin Statute adds a new subdivision as follows: "4a. By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

Hubbard v. Gurney, 64 N. Y. 457, 466; Union Trust Co. v. McCrum, 145 App. Div. 409; see also, Bank v. Graham, 246 Pa. St. 256; Brower v. Carpenter, 50 Misc. 525.

A mere agreement by the holder of a note to extend the time of payment and take other notes, on condition that the indorser of the original note should indorse the new one and not otherwise, which condition is not complied with, does not constitute an extension which will release the indorser.

Jennings v. Kosmak, 19 Misc. 433; see also, National Park Bank v. Koehler, 121 N. Y. Supp. 640; McCarthy v. Kipp, 171 Pa. 644.

It will be noted that this subdivision does not use the words "Principal debtor," or their equivalent, the wording being, "by any agreement binding upon the holder to extend the time of payment." Does that mean by any agreement binding upon the holder made with a stranger to the instrument, or must the binding agreement be made with the principal debtor?

The question does not seem to have been passed upon since the enactment of the statute in question or of similar statutes in other states.

Brosemer v. Brosemer, 162 N. Y. Supp. 1067.

In the case of National Park Bank v. Koehler, 204 N. Y. at page 178, 97 N. E. at page 468, Judge Gray wrote:

"The existence of the general rule is not in dispute, if there has been an agreement by the creditor with the principal debtor, which extends the time of payment of the debt, without the consent of the surety, or indorser, the latter is discharged."

As stated by Judge Gray, the rule that applies to a surety applies also to an indorser. Brandt on Suretyship (3rd ed.) Section 3.

Any agreement of the creditor which operates to extend the time of payment of the original debt and suspends the right to immediate action is held to discharge the non-assenting indorser or surety, as the law will presume injury to him thereby. The creditor may arrange with his debtor in any way which does not effect either of these results, but to prevent a discharge of the indorser or surety the agreement must expressly reserve all the remedies of the creditor against him, in which case the latter will be in a position to pay immediately and then proceed.

National Park Bank v. Koehler, 204 N. Y. 174; Greenberg v. Ginsberg, 82 Misc. 415; Moritz Estate, 239 Penn. St. 375.

It would seem that the words of the statute, "agreement binding upon the holder," should be construed to mean an agreement binding upon the holder made with the principal debtor.

Brosmer v. Brosmer, 162 N. Y. Supp. 1067.

By a valid agreement to give time is meant an agreement for the breach of which the maker or the acceptor has a remedy, either at law or in equity.

Veazie v. Carr, 3 Allen (Mass.) 14.

It has been said that the statute in question should be regarded simply as a codification of the common law.

Chemical National Bank v. Kellogg, 183 N. Y. 98, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717, 5 Ann. Cas. 158.

In the case of *National Bank of Mechanicsburg v. Graham*, 246 Pa. 256, 92 Atl. 198, the court, in writing of the provision said: "This was simply declaratory of the existing law."

A holder of a promissory note does not discharge an indorser by merely refraining from suing the maker. He may take new security or other notes as collateral to the old notes, and if time is not given to the maker, the indorser will not be discharged.

Riehl v. Austin, 155 App. Div. (N. Y.) 208.

An agreement between the holder and one ultimately liable on the instrument operates to release parties who are entitled to recourse against the party ultimately liable and who do not consent thereto.

Post v. Losey, 111 Ind. 74; *Hagey v. Hill*, 75 Pa. St. 108; *Delaware Ins. Co. v. Haser*, 199 Pa. St. 17; *Farmers' Savings Bank v. Arispe*, 139 Ia. 246; 117 N. W. 672; *Place v. Mellvain*, 38 N. Y. 96.

Payment of a portion of a note before maturity is a sufficient consideration for an extension of time on the balance.

Bowere v. Carpenter, 50 Misc. 525.

Agreement between holder and maker of notes, by which maker paid a part of the amount due and executed new notes for the balance, surrendering the old notes, held to discharge the indorser, notwithstanding a provision that it should not discharge the parties thereto from the previous indebtedness.

Greenberg v. Ginsberg, 82 Misc. 415.

See also, *National Citizens' Bank v. Toplitz*, 178 N. Y. 464; *Pomeroy v. Tonner*, 70 N. Y. 547; *State Bank v. Williams*, 164 Ky. 146.

§ 202. Right of party who discharges instrument. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

The words "remitted to his former rights" does not apply to a stranger who indorses a note for accommodation only and pays the same.

Lill v. Gleason, 92 Kans. 758, 142 Pac. 287; Noble v. Beeman Co., 131 Pac. (Or.) 1006; 46 L. R. A. 162; Quinby v. Varnum, 190 Mass. 211.

Subd. 1.—The possession of a promissory note by an indorser, after its protest for nonpayment, is *prima facie* evidence that he has performed his contract of indorsement and has paid the holder the amount due upon the note.

Hill v. Buchanan, 71 N. J. L. 301.

Where a second indorser of a promissory note has paid and taken it up, he became a holder for value and may maintain an action to recover the amount thereof of the first indorser, although both are accommodation indorsers.

Kelly v. Burroughs, 102 N. Y. 93.

Payment of a note in whole or in part by one secondarily liable thereon does not discharge the obligation of the maker.

Assets Co. v. Mercantile National Bank, 167 App. Div. 761; Twelfth Ward Bank v. Brooks, 63 App. Div. 221, Subd. 1.

Where the consideration for which one signed a check obtained from him by false pretenses never passed to him, the one so obtaining the check is primarily liable to an indorsee; and payment by him to the indorsee discharges the check as against all the parties.

Josephson v. Gens, 85 Misc. 372.

Subd. 2.—Where the consideration for which one signed a check obtained from him by false pretenses never passed to him, the one so obtaining the check is primarily liable to an indorsee; and payment by him to the indorsee discharges the check against all parties.

Josephson v. Gens, 85 Misc. 372.

This section is without application to one who indorses the note payable to a third person before delivery to the payee, and subsequently pays the note, and the payment by such indorser extinguishes the note, and it cannot be again transferred or made the basis of an action.

Quimby v. Varnum, 76 N. E. (Mass.) 671.

Where one of several accommodation makers of a joint and several promissory note paid the same, and subsequently transferred and delivered it for a valuable consideration to a third person held, that, although the

note as an obligation, was extinguished by the payment, yet it remained in the hands of the maker, who paid it, the evidence of his right of contribution from his co-sureties; and that the delivery raised a legal presumption of an intent to pass and did pass the rights to the transferee.

Dillenbeck v. Dygert, 97 N. Y. 303.

The contract of an accommodation indorser of a note is wholly independent of that of the maker, and such indorser, upon making payment, succeeds to the title and rights of the holder as against the maker.

Lill v. Gleason, 92 Kans. 757.

§ 203. Renunciation by holder. The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

The term "renunciation" describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration. The term as used includes the release of a claim by virtue of an accord and satisfaction, as well as a gratuitous waiver of liability.

Whitcomb v. National Ex. Bank, 123 Md. 612.

Where after a testator's death there is found among his papers a note payable to him and addressed to his executors, stating "Gentlemen, the enclosed note I wish to be cancelled in case of my death, and if the law does not allow it, I wish you to notify my heirs that it is my wish and orders." Such instrument is not effective to prevent the executors from enforcing such note, as it does not comply with this section.

Leask v. Dew, 102 App. Div. (N. Y.) 529, 184 N. Y. 599.

In *Dimon v. Keery*, 54 App. Div., under almost similar state of facts the court said: "It is manifest that the declaration upon the note was not a renunciation of the liability of the maker during the lifetime of the deceased, or any renunciation of the obligation of the instrument, and as it did not constitute a gift or an agreement, it neither fell within the terms of the statute nor exempted the defendant from liability thereon."

For cases under the Bill of Exchange Act, which in character and import is like this section, see:

Matter of George, L. R. 44 Ch. Div. 627.

This section plainly provides that the renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument, and if "renunciation" is used therein in the sense of a "release" there can be no question but what a written renunciation is necessary.

Trudeaux v. American Mills, 83 Pac. 725.

The holder and owner of a negotiable promissory note may covenant with the maker not to sue and reserve his rights against the indorsers.

Faniul Hall Bank v. Meloon, 183 Mass. 67.

Under this section a release of an indorser by a transaction amounting to an accord and satisfaction can only be proved by a renunciation in writing, notwithstanding Section 201 designating the acts which will discharge an instrument.

Whitcomb v. National Exchange Bank, 123 Md. 612; 91 Atl. 689.

§ 204. Cancellation; unintentional; burden of proof. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Some time after the making of a note, the maker and indorsers thereof, with one exception, but without the authority or knowledge of the board of directors of the bank, substituted for it their individual notes for equal sums amounting in the aggregate to the total of the note for which they were substituted. Held, that such substitution was unauthorized and therefore inoperative.

Union Bank v. Sullivan, 214 N. Y. 332.

Where the holder of a promissory note voluntarily cancels the same and surrenders it to the maker, this, although no consideration was paid, in the absence of fraud or mistake, operates in law as a release and discharges the maker's liability.

Larkin v. Hardenbrook, 90 N. Y. 333; Kent v. Reynolds, 8 Hun. 559; Jaffrey v. Davis, 124 N. Y. 164, 170.

In an action upon a note, the fact of erasing the indorser's name was made by his representative in the plaintiff's presence, is a fact which the jury may consider in determining whether the cancellation was authorized or consented to as claimed by the respective parties.

McCormick v. Shea, 50 Misc. 592; Schwartzman v. Post, 94 App. Div. 474.

Burden of proof.—See *Lorenz v. Jackson*, 88 Hun. 202; *Clinton v. Frear*, 107 App. Div. 571; *McCormick v. Shea*, 50 Misc. 594; *National Bank v. Gridley*, 112 App. Div. 403; *Gilley v. Harrell*, 118 Tenn. 116.

§ 205. Alteration of instrument; effect of. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Variant.—The Illinois statute adds the words “fraudulently or” before “materially” in the first line. The Wisconsin statute adds “orally or in writing” after “assented” in the first subdivision.

See notes Section 33.

“Subsequent indorsers” as used in the section mean those who indorse subsequent to the alteration.

First National Bank v. Gridley, 112 App. Div. (N. Y.) 402.

Any alteration of a written contract, which may in any event change the rights, duties or obligations of the party sought to be charged, is material regardless of whether the alteration is beneficial or prejudicial to him.

Barton Bank v. Stephenson, 87 Vt. 433; *Green v. Sneed*, 101 Ala. 205, 13 South 277; *Aldrich v. Smith*, 26 Am. Rep. (Mich.) 536; *Eckert v. Pickel*, 13 N. W. (Ia.) 708.

The indorser of a promissory note, the amount of which has been fraudulently raised after indorsement, is not liable upon the instrument, in the hands of a bona fide holder, for the increased amount, because of negligence in indorsing the same when there were spaces thereon which made the forgery easy, though the note was complete in form. No liability on the part of the indorser for the amount of such a note can be predicated simply upon the fact that such spaces existed thereon.

National Exchange Bank v. Lester, 194 N. Y. 464.

In *Hackett v. Bank of Louisville*, 114 Ky. 193, the contrary was held on the ground that proper precaution had not been exercised.

Where there is nothing suspicious upon the face of an instrument beyond the fact that an erasure is manifest, the presumption is that any alteration appearing on the face thereof was made before the execution of the instrument.

Ensign v. Fogg, 177 Mich. 318.

The banker is presumed to know the signature of his depositor and if he pays a forged check he cannot charge the amount to his account. If a check plainly appears to have been altered the banker is put on enquiry as to the correctness of the alteration and he pays it at his own peril. Where, however, the alteration is such as to excite no suspicion because the check has been drawn by the maker in such a way as to invite an unsuspecting alteration, the law makes an exception to the rule that the banker pays at his own peril and permits him to assert negligence on the part of the maker in so drawing his check.

Otis Elevator Co. v. National Bank, 124 Pac. Rep. 704; Timbel v. Garfield National Bank, 121 App. Div. 872; Oppenheimer v. W. S. Bank, 22 Misc. 722.

In Greenfield Savings Bank v. Stoll, 123 Mass. 196; it is held that the above principle did not apply to a note, because the maker of a promissory note held no such relation to the endorsees as does a depositor to his banker. On the other hand the Pennsylvania and Illinois Courts apply the principle to negligently drawn notes as well as to checks.

Gerard v. Haddan, 67 Pa. St. 82; Leas v. Walls, 102 id. 57; Harvey v. Smith, 55 Ill. 224.

While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to invite fraudulent alterations, it is not the law that he is bound to prepare the check that nobody else can successfully tamper with it.

Critten v. Chemical National Bank, 71 N. Y. 219; Mitchell v. Security Bank, 147 N. Y. Supp. 470.

The drawer is bound for the whole amount if his own negligence has facilitated or invited the fraud done by raising the check.

Bank of Commerce v. Union Bank, 3 N. Y. 230; 2 Dan. Neg. Int. (2nd ed.) 608; I. C. Bank v. F. P. Bank, 159 Pa. St. 47; Elias v. Whitney, 50 Misc. 326.

The bank is not responsible if the depositor has been negligent in examining his accounts and vouchers.

Meyers v. S. National Bank, 44 Atl. Rep. 280; L. M. Bank v. Morgan, 117 U. S. 96; Crawford v. W. S. Bank, 100 N. Y. 50; Weinstein v. National Bank, 69 Texas 38; Dana v. National Bank, 132 Mass. 156; National Bank v. Allen, 100 Ala. 476; Critten v. Chemical National Bank, 171 N. Y. 219; Continental Bank v. Metropolitan Bank, 107 Ill. 455.

As to the diligence required in the examination of the returned vouchers see, Leather Mfrs. Bank v. Richmond Co., 117 U. S. 96; Morgan v. U. S. Mortgage Co., 208 N. Y. 218; Scanlon Lumber Co. v. Germania Bank, 97 N. W. (Minn.) 380; Kenneth Co. v. National Bank, 77 S. W. (Mo.) 1002.

In *Garrard v. Haddan*, 67 Pa. St. 82, a space was left between the words "one hundred" and the word "dollars" in which "fifty" had been inserted after the maker had signed and delivered it; and the Court held the maker answerable to a bona fide holder for the full face of the note as altered on the ground of the negligence of the maker in leaving the space in the note which was thus filled up after execution. "We think this rule is necessary," said Chief Justice Thompson, "to facilitate the circulation of commercial paper and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers and others in taking it." It is a little difficult to see how the rule tends to make bona fide purchasers more careful, as this last observation suggests.

The case of *Yocum v. Smith*, 63 Ill. 321; held the maker liable upon a note which had been raised after execution from one hundred dollars to one hundred and twenty dollars, the words "and twenty" having been inserted in a space left between the word "hundred" and the word "dollars." The Court said that the maker had acted with unpardonable negligence in signing the note and leaving a blank which could so easily be filled; that he has thus placed it in the power of another to do an injury and that he must, therefore, suffer the resulting loss. It appeared that the maker there was informed by letter by the purchaser, very soon after the date of the note, that he had bought it and of its date and amount; yet he made no objection as to the amount until nearly a year later.

In *Scotland Co. National Bank v. O'Connel*, 23 Mo. App. 165, the defendants executed and delivered a note for \$100 to one Smith, the body of which was in his handwriting, in a condition which enabled him to add the words "thirty-five" after "one hundred" in the written part and put the figures "135" at the head of the note in the space where the amount is usually indicated by figures. The St. Louis Court of Appeals held that the defendants were liable for \$135, because they had delivered the note to Smith, who was their co-maker, "in such a condition as to enable him to fill the blank space without in any manner changing the appearance of the note as a genuine instrument."

The cases above cited were all of them actions against the makers of the raised paper. The same rule, however, was applied against an indorser in *Isnard v. Torres & Marquez*, 10 La. Ann. 103.

To the same effect is *Hackett v. First National Bank of Louisville*, 114 Ky. 193, where it was held that a surety who had signed a note in which were written the words "five hundred" with spaces before and after them, which the maker had filled up by writing "twenty" before and "fifty" after them, thereby making a note for \$2,550, was liable thereon to a purchaser in good faith. In this case the attention of the Kentucky Court of Appeals was called to the fact that the great weight of authority was

the other way, but in view of the fact that the rule had been so established in Kentucky for a quarter of a century the Court determined to adhere to it, in observance of the principle of *stare decisis*.

Where negotiable paper has been executed with the amount blank, it is no defense against a bona fide holder for value for the maker to show that his authority has been exceeded in filling such blank, and a greater amount written than was intended. This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written. "It has now, however, become in America an established rule that if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention will constitute a material alteration and operate to discharge the maker."

1 Randolph on Commercial Paper, 187. Useff v. Herzenstein, 65 Misc. 45.

The rule thus stated is sustained by the decisions of the courts of last resort in Massachusetts, Michigan, New Hampshire, New York, Iowa, Maryland, Mississippi, Arkansas and South Dakota.

The leading case sustaining this view is *Greenfield Savings Bank v. Stowell* (123 Mass. 196), in which the opinion was written by Chief Justice Gray, afterward an Associate Justice of the Supreme Court of the United States. The discussion is careful and exhaustive, reviewing all the important cases in England and America bearing upon the subject which had been decided up to that time (1877).

A bank may only pay out the funds of a depositor in conformity to his directions; it is not entitled to charge to him checks presented which have been altered in a material point without his consent, even if done so skillfully as to defy detection, and the bank is responsible for an omission to discover the original terms and conditions thereof. The change of the date of an instrument, whereby the time is accelerated, is a material alteration, and when made without the consent of the maker, destroys its validity.

Crawford v. W. S. Bank, 100 N. Y. 50; *National Exchange Bank v. Lester*, 194 N. Y. 461; *Chicago Savings Bank v. Block*, 126 Ill. App. 128; *Morris v. Beaumont Bank*, 37 Tex. Civ. 97; 83 S. W. Rep. 36.

So also by adding the words: "with interest."

Columbia Dis. Co. v. Rech, 151 App. Div. (N. Y.) 128; *Broadway National Bank v. Hefferman*, 220 Mass. 247.

Where the cashier of a bank changed the name of the bank where the check was made payable, where the drawer made a mistake in drawing

it on the wrong bank and should have been drawn as altered, it was held that such alteration made the check void.

Whitset v. People's Bank, 119 S. W. (Mo.) 999.

An alteration which is not material does not invalidate the instrument.

Gleason v. Hamilton, 138 N. Y. 353; *Condict v. Flower*, 106 Ill. 105; *Nickerson v. Sweet*, 135 Mass. 514; *Colonial Bank v. Duerr*, 108 App. Div. (N. Y.) 217; *Levy v. Arons*, 81 Misc. 165; *Booth v. Powers*, 56 N. Y. 22, 31.

The words "with the privilege of renewal for one year" written in the body of a note after delivery and negotiated to another without notice of the change, it was held that if such alteration had been made by the plaintiff after delivery and it was found to be material, the defendant would have been relieved from the performance of his promise. But if deemed immaterial he would have been held liable.

Thorpe v. White, 188 Mass. 834.

Where upon false representation of the payee of defendant's check that he had lost it, a new check is given and cashed, defendants under this section are liable to an innocent holder in due course of the first check, the date of which had been altered by the payee.

Moskowitz v. Deutsch, 40 Misc. 603; *Andrus v. Bradley*, 102 Fed. Rep. 54; *Mass. National Bank v. Snow*, 187 Mass. 159; *Thorpe v. White*, 188 Mass. 333; 74 N. E. 592.

Authority to fill blank space in a negotiable instrument does not justify changing or altering another place, and an indorser having notice of such alteration could not be a holder in due course, and even though he paid value he could not recover according to the original tenor.

Bank v. Barnum, 160 Fed. Rep. 245.

A material alteration of a written instrument by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract, and substitutes a different agreement for that which he entered. In the application of this rule, it is not only well settled that a material alteration of a promissory note by the payee or holder discharges the maker, even as against subsequent innocent indorsee for value, but it has been adjudged that a material alteration of a note before its delivery to the payee by one of two joint makers, without the consent of the other, makes it void as to him.

Mersman v. Werges, 112 U. S. 141; *Pensacola Bank v. Melton*, 210 Fed. 57.

An indorser of a note who admits the note, but alleges that it was altered after his indorsement and diverted, must establish this by affirmative defense, as well as notice to the holder of such diversion, and he should be permitted to do so.

Mutual Loan Assn. v. Lesser, 76 App. Div. 614.

By virtue of this statute, a party to a negotiable instrument must respond to "a holder in due course" upon the obligation which he in truth assumed, notwithstanding the fact that the instrument may have been changed so as to import a different obligation.

Ensign v. Fogg, 177 Mich. 317, 143 N. W. 82; Voris v. Anderson (Okl.) 153 Pac. 291; Zehr v. Champlain (Okl.) 159 Pac. 1185; Thorpe v. White, 188 Mass. 333, 74 N. E. 592; Massachusetts National Bank v. Snow, 187 Mass. 159, 72 N. E. 959; National Exchange Bank v. Lester, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402, 16 Ann. Cas. 770; Moskowitz v. Deutsch, 46 Misc. Rep. 603, 92 N. Y. Supp. 721; Mutual Loan Ass'n v. Lesser, 76 App. Div. 614, 78 N. Y. Supp. 629; Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131, 31 L. R. A. (N. S.) 643; Bothell v. Schweitzer, 84 Neb. 271, 120 N. W. 1129, 23 L. R. A. (N. S.) 263, 133 Am. St. Rep. 623.

§ 206. What constitutes a material alteration. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Subd. 1.—See notes to Sections 33 and 205; Moskowitz v. Deutsch, 40 Misc. 603; National Ulster Co. Bank v. Madden, 114 N. Y. 280.

Where a party to a negotiable instrument intrusts it to another for use as such with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or altering the date or other material terms, by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly expressed in the instrument.

Angel v. N. W. Mutual Life Ins. Co., 69 Mo. 554.

The change of date of an instrument, whereby the time of payment is accelerated, is a material alteration, and when made without the consent of the maker destroys its validity.

Crawford v. W. S. Bank, 100 N. Y. 51; *Eastman v. Shaw*, 65 N. Y. 522; *Miller v. Gilleland*, 9 Penn. St. 119; *Hervey v. Harvey*, 15 Me. 357.

Subd. 2.—See *Birmingham Trust Co. v. Whitney*, 95 App. Div. (N. Y.) 280; *Colonial National Bank v. Duerr*, 108 App. Div. 215.

Where the payee of a note without interest adds the words "with interest" without the knowledge or consent of the maker, there is an alteration within the meaning of this section, and not only vitiates the note but extinguishes the original indebtedness.

Columbia Dis. Co. v. Rech, 151 App. Div. (N. Y.) 128; *Meyer v. Huneke*, 55 N. Y. 419; *Farmers' National Bank v. Auto Co.*, 79 Hun. 595; *Dumbrow v. Gelb*, 72 Misc. 400; *McGrath v. Clark*, 56 N. Y. 34; *Broadway National Bank v. Hefferman*, 220 Mass. 247.

The reason of the law imposing the forfeiture of the debt itself upon one who tampers with the instrument is upon the principle that "no man should be permitted to take the chance of gain by the commission of a fraud, without running the risk of loss in case of detection."

Dan. Neg. Inst. (5th ed.), Section 1410a.

Subd. 3.—See, *Troy City Bank v. Lauman*, 19 N. Y. 480; *Walker v. Bank of New York*, 13 Barb. 636; *Melton v. Pensacola Bank*, 190 Fed. 134.

There is no question that the change in the place where a note is made payable is a material alteration which releases an indorser unless it is done with his assent.

First National Bank v. Barnum, 160 Fed. 250; 2 Am. & Eng. Ency. of Law, 253; *Simpson v. Bovard*, 74 Pa. 351; *Angel v. N. W. M. Life Ins. Co.*, 92 U. S. 330.

The omission of the place of payment, there being nothing in the frame of the instrument to indicate that the one which was subsequently inserted was intended, is not enough in itself to raise an inference of authority to do so, such a clause not being necessary to the completeness of the instrument.

McCoy v. Lockwood, 71 Ind. 319; *Toomer v. Rutland*, 57 Ala. 379; *McGrath v. Clark*, 56 N. Y. 34.

Subd. 4.—The holder of a promissory note, without the knowledge or consent of the indorser, procured a third person to sign it for the purpose of adding to their security. The subscription was the same in form as if he had been the original maker. This is not such an alteration as to vitiate the note and discharge the indorser.

McGaughey v. Smith, 27 N. Y. 39; *Hoffman v. Planters' Bank*, 99 Va. 480.

The indorsement of all the payees of a promissory note is necessary to give good title to the transferee, and hence an indorser of a note made payable to several payees is not liable to a transferee thereof when the

maker, without authority from, or knowledge of the indorser, has altered the note before negotiation by striking out the name of one payee and substituting his own name as payee thereon.

First National Bank v. Gridley, 112 App. Div. (N. Y.) 398.

An alteration which changes the effect of the instrument in any respect is a "material alteration." A change in a note payable to order, made by striking out the words "order of" and inserting after the name of the payee the words "or bearer," is a material alteration, which invalidates the instrument if made after delivery, or, if made by the maker of the payee before delivery, discharges a surety.

Builders v. Weimer, 151 N. W. Rep. 100; Needles v. Shaffer, 60 Ia. 65; Croswell v. Labree, 81 Me. 44; Booth v. Powers, 56 N. Y. 22; Weaver v. Bromley, 65 Mich. 212; Draper v. Wood, 112 Mass. 315; McGrath v. Clark, 56 N. Y. 34; 2 Dan. Neg. Int., Section 373a.

A change of the pronoun "I" to "we" in a promissory note is a material alteration, since it changes the obligation from a joint and several to a joint obligation.

Humphrey v. Guillon, 13 N. H. 385.

Subd. 5.—See Angel v. Insurance Co., 92 U. S. 330.

Last subdivision.—A lead pencil entry on the back of a promissory note beneath the indorser's signature of the words "Glens Falls, N. Y." made by the manager of the bank for the purpose of aiding its clerk in keeping the bank records, does not constitute an alteration which will relieve the indorser from liability.

Merchants' Bank v. Brown, 86 App. Div. 599; Struthers v. Kendall, 41 Penn. St. 214; Daniel Neg. Inst. (5th ed.) 1399.

ARTICLE II

Bills of Exchange; Form and Interpretation

Section 210. Bill of exchange defined.

211. Bill not an assignment of funds in hands of drawee.

212. Bill addressed to more than one drawee.

213. Inland and foreign bills of exchange.

214. When bill may be treated as promissory note.

215. Referee in case of need.

§ 210. Bill of exchange defined. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

Bill of Exchange.

\$ 600	Boston, Mass. June 1, 1917
One month after date	Pay to
the order of Benjamin Franklin	
Five hundred	Dollars
Value received and charge the same to account of	
To Cash of M. F. F. F.	Francis A. Hallist
No. Atlanta, Ga.	

Bill of exchange is usually drawn against commodities sold and delivered or about to be delivered by the drawer to the drawee, but this is not necessarily so. It is usually drawn against a deposit of money, although it may be drawn and accepted as an accommodation by the drawee. Until a bill of exchange is accepted the drawer is as between the

parties, the one primarily liable on it. After acceptance the acceptor becomes the one primarily liable followed by the drawer and indorsers in their order. The holder, however, does not have to recognize this order of liability. He may proceed against any or all of them irrespective of their liability among themselves, or the order in which their names appear. The drawer warrants to the indorsers and to the holder that the drawee will accept and pay and if the drawee does not, that he, the drawer, will pay if the bill is duly and properly presented and protested. Each indorser warrants the same to the holder and each subsequent indorser—but not to the maker. The holder warrants the signature of the indorsers and this warranty does not cease on the payment of the instrument. The essential parts of a bill of exchange are, *Date*, which is usually of the time of its issue, but may be dated ahead or back. *Time*, which is on demand or some fixed or determinable time; if no time is stated it will be deemed payable on demand. *Order*, which must be specific and must not direct payment out of a special fund. *Amount*, must be payable in money and not “current funds” or other qualified terms. *Value received*, while usually used are not essential to the validity of the bill. *Drawee*, name and address. *Acceptance*, to be in writing and signed by the drawee, for which no particular words are necessary: usually “Accepted” followed by the date and name of the acceptor. The acceptance is usually written on the face of the bill, but is sufficient if it appears anywhere thereon. It is the right of the payee to have an unconditional and unqualified acceptance, and if he consents without the consent of the drawer to take a conditional acceptance he thereby releases the drawer from all liability. In the foregoing illustration Benjamin Franklin is the payee, Frank A. Wallace the creditor is the maker and Charles A. Martens the drawer and acceptor.

The object of drawing a bill is to convert a debt, in theory supposed to be due from the drawee to the drawer, into a transferable chattel that may pass from one to another by indorsement or by delivery, and this object is consummated by the acceptance, which binds the acceptor to whoever becomes the holder, to pay the original debtor absolutely and without any reference to the state of the account between himself and the drawer, leaving the latter still liable under his original conditional obligation to pay in default of payment of the primary debtor.

3 R. C. L. 1297; *Manchester v. Braedner*, 107 N. Y. 346; *Amsick v. Rogers*, 189 N. Y. 252; *Kimball v. Donald*, 20 Mo. 577; 64 Am. Dec. 209.

A bill of exchange is described as a written request from one person to another a specified sum of money therein mentioned at a time certain absolutely in all events.

Wheatley v. Strobbe, 73 Am. Dec. (Cal.) 522; *Asmick v. Rogers*, 189 N. Y. 252; *Allen v. Leaven*, 37 Pac. 488.

A bill of exchange drawn on a bank, if payable on demand, is a check, and such a bill is payable on demand unless a specific date of payment is mentioned.

Riddle v. Bank of Montreal, 145 App. Div. (N. Y.) 207.

Where for valuable consideration received from the payee, an order is drawn upon a third person, payable out of a particular fund then due or to become due from him to the drawer, the delivery of the order to the payee operated as an assignment *pro tanto* of the fund; the drawee is bound after notice thereof to apply the fund, as it accrues, to the payment of the order, and the payee may be action compel such application.

Brill v. Tuttle, 81 N. Y. 454.

A bill of exchange upon acceptance becomes in effect a promissory note, the acceptor standing in the place of the maker and becoming primarily liable, and the maker standing in the place of the first indorser.

U. S. Rail Co. v. Weiner, 169 App. Div. (N. Y.) 561.

The bill itself implies a representation by the drawer that the drawee is in funds to meet it, and the contract of the former is that the latter will accept and pay according to the terms of the bill, the subsequent acceptance constitutes an admission of the truth of the representation, which cannot thereafter be retracted,

Heuerematte v. Morris, 101 N. Y. 63.

An instrument in the following form:

New York, July 20, 1895.

Charles F. Fontham,

Dear Sir:—Please pay to the American Boiler Co. the sum of \$187.15 and charge the same to my account on heating contract at 64 West 99th St. and oblige,

Yours respectfully,

H. J. APGAR.

“Accepted, and I agree to pay the sum specified within 60 days from date.

CHARLES F. FONTHAM.

is a mere order on a fund and is not an accepted bill of exchange, and in an action brought thereon by the payee against the acceptor, the latter has the right to show that there was nothing due on the contract.

American Boiler Co. v. Fontham, 34 App. Div. 295; Butterick v. Colline, 202 Mass. 413.

An order for the payment of money, addressed to no one in particular but generally to any one who owed him money is too indefinite and uncertain to be binding on any one.

Dugane v. Hoenza, 119 N. W. Rep. 141.

An instrument drawn by one person on another person not a bank, requiring the person to whom it is addressed to pay on demand a certain sum of money to the order of the drawer is a bill of exchange and not a check.

Amsick v. Rogers, 103 App. Div. 189 N. Y. 252.

Where a bill of exchange is drawn by a corporation upon itself, the instrument may be treated as an accepted bill or as a promissory note at the election of the holder.

Pavenstedt v. N. Y. Life Ins. Co., 203 N. Y. 91.

Cases on subject generally, see, *Home Bank v. Drumgoole*, 109 N. Y. 63; *Munger v. Shannon*, 61 N. Y. 251; *Lynch v. Bank of New Jersey*, 107 N. Y. 179; *Buskirk v. State Bank*, 83 Pas. (Colo.) 778; *Columbia Bank v. Bowen*, 114 N. W. (Wis.) 451; *Shaver v. Western Union Co.*, 57 N. Y. 459.

Draft.

\$ 800 00	St Louis Mo June 2 1917
at sight	Pay to
the order of Union Bank	
Eight hundred	Dollars
Value received and charge the same to account of	
To Charles W. Martens	
No Atlanta Ga	Frank A. Wallis

The word draft is applied to instruments in the form of bills of exchange drawn for the purpose of collecting for the drawer's own use and account, money due him from some person. The payee of a draft is usually a bank delegated by the drawer to make the collection, and are usually made payable to a bank where the debtor resides. If the drawee was a bank the instrument would be, strictly speaking, a check. The essential parts of a draft are, *Time*, which shall be such time as the drawer shall fix and is usually "at sight." *Amount*, which should be definite. *Value received* is not necessary although customary to insert as in notes and bills of exchange. *Drawee*, whose name and address should be given for the information of the payee. *Signature*, of the drawer. In the draft illustrated the Union Bank is the payee, Charles W. Martens the debtor and drawee, and Frank A. Wallis the creditor and drawer.

§ 211. Bill not an assignment of funds in hands of drawee. A bill of itself does not operate as an assignment

of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

But where the drawee is a banker and has funds of the drawer on deposit, he is liable to an action for damages by the depositor for dishonoring a check, to meet which he has sufficient funds. See notes to Section 325.

A check is analogous to a bill of exchange, and a bank cannot be made liable thereon except by its acceptance indorsed upon it in writing.

Risley v. Phoenix Bank, 83 N. Y. 318; *Lynch v. National Bank of N. J.* 107 N. Y. 179; *Cowperthwaite v. Sheffield*, 3 N. Y. 251; *Brill v. Tuttle*, 81 N. Y. 454.

An order drawn by a creditor on his debtor, directing the debtor to pay a certain amount to a third party, is not effectual as an equitable assignment unless it is drawn upon a particular fund. Such an order is not binding upon the debtor as a bill of exchange unless he signs a written acceptance thereof.

Izzo v. Ludington, 79 App. Div. (N. Y.) 272; *Shaver v. W. U. T. Co.*, 57 N. Y. 459; *Attorney General v. Continental Life*, 71 N. Y. 325; *Weinhauer v. Morrison*, 49 Hun. 498.

A check or draft drawn in the ordinary form does not operate as an equitable assignment of the funds of the drawer in the hands of the drawee or create any obligation against the drawer in favor of the payee until its acceptance by or delivery to him.

McArdle v. German Ins. Co., 183 N. Y. 368.

Where a draft drawn upon the general credit of the drawer with the drawee does not operate as an assignment of a particular fund, even though one to which the draft is to be charged is indicated, yet where it is the intention of the parties that the draft shall be paid out of a particular fund and not absolutely and at all events, it operates as an assignment of the fund.

Muller v. Kling, 149 App. Div. (N. Y.) 177; *Fourth Street Bank v. Yardley*, 165 U. S. 634; *Brille v. Tuttle*, 81 N. Y. 454.

Where the mere delivery to a third person of a check or draft drawn by a creditor upon his debtor does not effect a legal transfer of the debt, where it appears that the intent was to make such a transfer, it is the duty of the court to carry out the intent.

Throop Co. v. Smith, 110 N. Y. 83.

The drawer of a bill of exchange is presumed to know the handwriting of the drawer. And the payment of the bill by the drawee is ordinarily an admission of the drawer's signature, which he is not afterwards, in a

controversy between himself and the holder, at liberty to dispute. And therefore if the drawer's signature is on a subsequent day discovered to be a forgery, the drawee cannot compel the holder, to whom he has paid the bill, to restore the money, unless the holder be in some way implicated in the fraud. But the reason of the rule fails, and the rule itself does not apply where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill.

Bank of Commerce v. Union Bank, 3 N. Y. 230; *White v. Bank*, 64 N. Y. 316.

A check does not operate as an assignment of the funds in the bank. *Rankin v. Colonial Bank*, 31 Misc. 227, 230.

The effect of the acceptance is to constitute the acceptor the principal debtor. By the act of acceptance he assumes to pay the order or bill, and becomes the principal debtor for the amount specified; the acceptance being an admission of everything essential to the existence of such liability.

Clayton v. Drug Co., 147 Pac. Rep. 460; *Reilly v. Daly*, 159 Pa. St. 605.

Cases on the subject generally, see, *Harris v. Clark*, 3 N. Y. 93; *Alger v. Scott*, 54 N. Y. 14; *Munger v. Shannon*, 61 N. Y. 251; *Bailey v. R. R. Bank*, 11 Fla. 266; *Fulton v. Gesterding*, 47 Fla. 150.

There is a distinction between an order and a bill of exchange. An order payable out of a designated fund is a specific appropriation of that fund and invests in the payee a right to the particular thing thus appropriated, which will be made effective, as against the thing, by treating the person on whom the order is drawn as a holder of what is so specifically appropriated for him in whom it has been vested by the order. A bill of exchange confers no such rights and has no such effect. It is payable generally, absolutely and at all events. It does not appropriate any particular thing to the payee. The idea of a transfer of assignment to the payee or an interest in a particular fund does not obtain in reference to a bill of exchange. If accepted by the drawee, he is bound by virtue of his acceptance, and not upon the ground of an assignment of so much money in his hands belonging to the drawer. A bill of exchange does not amount to an assignment, even after it has been accepted.

3 R. C. L. 1298; *Bush v. Foote*, 38 Am. Rep. 310; *Kimball v. Donald*, 64 Am. Dec. (Mo.) 209.

§ 212. Bill addressed to more than one drawee. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

Variant.—The Wisconsin statute omits the words "or in succession."

This section seems to be inconsistent with Section 27, Subd. 5.

§ 213. Inland and foreign bills of exchange. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

A written instrument for the payment of money addressed by a firm doing business in the City of New York to a firm doing business in Vienna, Austria, signed by the firm giving it, requiring the firm to which it is addressed to pay on demand a specific sum in English money to the order of the drawers and charge the same to the account of a cargo of pig iron shipped to Vienna from a specified steamship, is a foreign bill of exchange within this section.

Amsinck v. Rogers, 189 N. Y. 252.

The laws of the place where bills are payable, determine what constitute payment.

Kessler v. Armstrong Co., 158 Fed. 747; *Sexton v. Armstrong Co.*, 207 U. S. 597.

The damages recoverable by the payee of a negotiable foreign bill of exchange protested for nonpayment against the drawee may be deemed to be made up as follows: (1) The face of the bill; (2) interest thereon; (3) protest fees; (4) re-exchange, i. e., the additional expense of procuring a new bill for the same amount payable in the same place on the day of its dishonor; or a percentage in lieu of such re-exchange in jurisdictions where it is prescribed by statute.

Bank of U. S. v. United States, 2 How. (U. S.) 745; *Oliver Co. v. Walbridge*, 19 N. Y. 134; 2 Dan. Neg. Inst. (4th ed.) Section 1444; *Pavenstedt v. Life Ins. Co.*, 203 N. Y. 91.

See also, *Riddle v. Bank of Montreal*, 145 App. Div. N. Y. 207; *Casper v. Kuhne*, 159 App. Div. (N. Y.) 390.

A bill in form drawn in United States of Columbia by a corporation on itself in New York is a foreign bill and not a simple order or note.

Pavenstedt v. N. Y. Life Ins. Co., 203 N. Y. 91.

§ 214. When bill may be treated as promissory note. Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not

having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Variant.—The Wisconsin statute omits the words “or a person.”
See Section 36, subd. 5.

A draft drawn by an agent on his principal by authority of the principal is equivalent to a draft drawn by the principal upon himself, and need not be accepted by the drawee in order to bind it.

Gray Co. Farmers' Bank, 60 S. M. 537; Falk v. Meade, 127 U. S. 702; Dow Law Bank v. Godfrey, 126 Mich. 521.

Where a sight draft is drawn by an agent upon his principal in payment of purchases for the drawee, the effect is that of a bill drawn upon the drawer himself, which the holder may treat as a promissory note.

Clements v. Stanton Co., 61 Wash. 419.

Cases on the subject generally, see, 1 Dan. Neg. Inst. Section 398; Bank of Genesee v. Patchin, 19 N. Y. 312; Sally v. Terrill, 55 L. R. A. 730; Cunningham v. Wardell, 12 Me. 466; 4 Am. & Eng. Ency of Law, (2nd ed.) 109; McCann v. Randell, 147 Mass. 91; Bull v. Sims, 23 N. Y. 370; Pavestadt v. Life Ins. Co., 203 N. Y. 95.

§ 215. Referee in case of need. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

ARTICLE 12**Acceptance**

Section 220. Acceptance; how made.

- 221. Holder entitled to acceptance on face of bill.
- 222. Acceptance by separate instrument.
- 223. Promise to accept; when equivalent to acceptance.
- 224. Time allowed drawee to accept.
- 225. Liability of drawee retaining or destroying bill.
- 226. Acceptance of incomplete bill.
- 227. Kinds of acceptances.
- 228. What constitutes a general acceptance.
- 229. Qualified acceptance.
- 230. Rights of parties as to qualified acceptance.

§ 220. Acceptance; how made. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

\$ 1000.00	New York, N.Y. Nov 15, 1915
Pay to the order of Ernest Weiner & Co.	Pay to
One thousand	Dollars
Value received and charge the same to account of	
To Ernest Weiner & Co.	United States Rail Co.
No.	J. S. Shannon, Treas.

(INDORSED)

ERNEST WEINER

CHESTER W. TALLCOTT

UNITED STATES RAIL CO., D. F. SHANNON, TREAS.

PAY TO THE ORDER OF ANY BANK, BANKER OR TRUST CO.

DEC. 10, 1915

ALL PRIOR INDORSEMENTS GUARANTEED

THIRD NATIONAL BANK

Upon acceptance a bill of exchange becomes in effect a promissory note, the acceptor standing in the place of the maker, and becoming primarily liable, and the maker standing in place of the first indorser. So in the case illustrated upon its face, Ernest Weiner & Co. become primarily liable and the United States Rail Co. secondarily liable to Ernst Weiner and C. W. Tallcott. When the acceptor defaulted in payment the United States Rail Co. obligation arose, and when it acquired title to the note its liability was extinguished because it was both debtor and creditor.

United States Rail Co. v. Weiner, 169 App. Div. 561.

Prior to the adoption of the statute acceptance could be made orally.

Johnson v. Clark, 39 N. Y. 216; Bank v. Wetherald, 36 N. Y. 335; Aetna Bank v. Fourth National Bank, 46 N. Y. 88; Wright v. Bank, 64 N. Y. 316; Hanna v. McCrary, 141 Pac. 996.

Until the bill has been accepted the drawer is the primary debtor. After acceptance the drawer becomes secondarily liable, and his liability is the same as that of a first indorser upon a promissory note. The effect of acceptance of a bill is to constitute the acceptor the principal debtor.

A. Clayton Co. v. Drug Co., 147 Pac. 460.

Acceptance must be made by the drawee or his duly authorized agent and must be in writing.

Hascall v. Association, 5 Hun. 152; Izzo v. Ludington, 79 App. Div. 275; Risley v. Phenix Bank, 83 N. Y. 318.

The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former. The rule of law is not unjust that prevents the acceptor from showing as a defense against a suit by the payee a want of funds of the drawer in his hands, for it was his duty to ascertain before he accepted the bill whether he owed the drawer that amount. This was exclusively within his knowledge, but the plaintiff had no means of knowing how the fact was, and he had a right to assume that the defendant would not accept the bill unless he had funds of the drawer, sufficient to make good the acceptance.

Jarvis v. Wilson, 46 Conn. 90; Brill v. Tuttle, 81 N. Y. 454.

This section requiring the acceptance of a bill of exchange to be in writing, does not apply to a foreign bill payable in another state; the law of such state not having been proved, until such proof, the common law rule will be presumed to apply, according to which acceptance may be oral.

Bank v. Bright, 120 S. W. Rep. (Mo.) 648.

Oral acceptance is not binding on the drawee.

Clayton Co. v. Drug Co., 147 Pac. 460.

An acceptance of a bill cannot, as against a bona fide holder for value, defend on the ground that the acceptance was without consideration or for accommodation.

National Park Bank v. Saitta, 127 App. Div. 625; Arpin v. Owens, 140 Mass. 141; Heuertematte v. Morris, 101 N. Y. 63.

A bill of exchange is negotiable before acceptance and the acceptance is an acknowledgement of the debt it represents, and an absolute promise to pay it to the person who is or shall become the holder of the bill; and to allow a want of consideration for the acceptance to defeat the right of a bona fide holder, whether he became such before or after acceptance, would be contrary to the nature and purpose of bills of exchange and to the uniform usage in regard to them.

Arpin v. Owens, 140 Mass. 144.

A bank is not liable on equitable grounds to the holder for the amount of an unaccepted check which it has refused to pay because the holder acquired the check on the oral representation of the bank that the drawer had funds on deposit to meet the check, that the check was good, and that the holder might safely take it in payment for goods sold the drawer.

Rambo v. Bank, 88 Kans. 257.

One H sent a telegram to the defendant reading, "Will you wire me that you will honor draft for \$300?" Defendant telegraphed back, "I will." Thereupon, H presented draft for \$300, drawn on defendant to H's order, and the two telegrams to plaintiff which purchased the draft on the strength of the telegrams. Held, that the telegrams created an agreement on the part of defendant to honor the draft.

Oil Well Co. v. MacMurphy, 119 Minn. 500; *see also*, *Carmichael v. Banking Co.*, 191 S. W. 1043; *In re Armstrong*, 41 Fed. 381; *Myers v. Bank*, 27 Ill. App. 254; *Bank v. Garretson*, 51 Fed. 168.

Pleading.—While the section requires the acceptance to be in writing, an allegation in the complaint that the drawee "agreed to pay the order" is sufficient.

Barnsdall v. Waltemeyer, 142 Fed. Rep. 415.

A complaint in an action upon an order or bill of exchange is insufficient, and a demurrer thereto is properly sustained for want of sufficient facts where it fails to allege that the acceptance of the order by defendant was in writing.

Wadhams v. Portland R. Co., 37 Wash. 86.

§ 221. Holder entitled to acceptance on face of bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and if such request is refused, may treat the bill as dishonored.

This provision is not confined to sight bills, but seems to be applicable to bills of exchange, and consequently if a bill had been presented to the drawee and he refused to accept it the holder would be entitled to treat the bill as dishonored, and would have acquired the immediate right to call on the other parties to the bill.

National Park Bank v. Saitta, 127 App. Div. 627.

§ 222. Acceptance by separate instrument. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Variant.—The Illinois statute omits the words "to whom it is shown and."

An action cannot be maintained against a drawee until he has become a party to the instrument by his written acceptance. The fact that he wrote a letter to the drawer that money was close but that he would pay is not sufficient to hold the drawee and make him a party to the bill.

Fairchild v. Feltman, 32 Hun. 399.

An acceptance of a draft may be upon a separate paper and the acceptor may impose any conditions which he may choose. A letter accompanying a draft may be used to qualify or limit an acceptance indorsed on a draft, provided the question of innocent holder is not involved in the case.

Lehnhard v. Sidway, 160 Mo. App. 83.

A written agreement modifying the terms of an accepted bill of exchange and securely glued thereto, is a part thereof and cannot be lawfully detached therefrom without the maker's consent.

Bothell v. Schqetzer, 84 Neb. 271; *Gerrish v. Glines*, 56 N. H. 9; *Stephens v. Davis*, 2 S. W. (Tenn.) 382; *Scofield v. Ford*, 56 Ia. 370; *Wait v. Pomeroy*, 20 Mich. 425.

A telegram agreeing to accept a person's draft for a certain sum "for stock" is not a conditional contract, but an absolute undertaking to accept and pay the same; and a party discounting the draft, on the faith of such telegram, is entitled to recover the amount of the party so agreeing to accept.

Coffman v. Campbell, 87 Ill. 98.

The words "for stock" subserves no purpose as between the payee and the acceptor. At most, those words are but an indication of the nature of the consideration as between the drawer and acceptor.

State Bank v. Bradstreet, 89 Neb. 188; *Bissell v. Lewis*, 4 Mich. 450.

§ 223. Promise to accept; when equivalent to acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Variant.—The Illinois statute adds the words "or after" after the word "before."

On the subject embodied in the section the court, in *Miller v. Kling*, 149 App. Div. 180, said: "It is frequently a nice question to what extent a promise to accept a bill not in existence binds the promisor to third parties who have acted on the faith of it. The section is declaratory of the common law" (see *Mason v. Hunt*, 1 Dong. 297). In that case Lord Mansfield said: "But an agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill knowing of the conditions annexed to the agreement, he takes it subject to such conditions."

See on the subject generally, *Greele v. Parker*, 5 Wend. 414; *Ulster County Bank v. McFarlan*, 5 Hill 432; *Shaver v. Western Union Tel. Co.*, 57 N. Y. 459; *Merchants' Bank v. Griswold*, 72 N. Y. 472; *Ruiz v. Renauld*, 100 N. Y. 256; *Germania National Bank v. Taaks*, 101 N. Y. 442; *Story Bills*, Sec. 249; *Parsons Notes and Bills*, 292.

Where to a promise to accept a bill of exchange is attached a condition precedent, which is a substantive part of the promise, and is so coupled with it as to show that the promisor did not intend to bind himself, except on compliance with the condition, this is not an unconditional promise to accept within the meaning of the statute such as will support an action against the promisor as acceptor.

Germania National Bank v. Taaks, 101 N. Y. 442.

An absolute authority to draw is equivalent to an unconditional promise to pay.

Barney v. Worthington, 37 N. Y. 112; *Merchants' Bank v. Griswold*, 72 N. Y. 479.

Telegraphic authority to draw was an unconditional promise to accept within the statute.

Johnson v. Clark, 39 N. Y. 218; *Wells v. Western Union Telegraph Co.*, 144 Ia. 605; 123 N. W. 371; 24 L. R. A. 1045; *Brunkman v. Hunter*, 73 No. 172.

A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.

Bank v. Hay, 143 N. C. 332; *First National Bank v. Muskogee*, 40 Okla. 603.

The promise must so describe the bill that there can be no doubt of its application to it.

Bank of Flora v. Clark, 61 Md. 405.

Where defendants, co-partners, engaged in cutting timbers, sublet the work to M, who in turn sublet to one H, and agreed with the latter that they would pay the men employed by him, and he drew orders in favor of the laborers on one of the defendants, which were cashed by the plaintiff on the request of one of the defendants, and on his promise to pay. Held, that defendants, while not liable on the order in that there was no written promise to accept them as required by this section, but that they were liable nevertheless, for the plaintiff paid the money and became their agent.

Nagle v. Richards, 134 App. Div. 25.

§ 224. Time allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

The intention of this section is to expediate action by the drawee in accepting or refusing a bill presented and retained by him, and to fix a definite time, which before the adoption of the statute was uncertain. He is granted twenty-four hours after delivery, and not after demand for a return of the bill, in which he must accept or decline to honor it. The time for returning the bill to the holder does not begin to run from the demand for its return, but the date of its delivery. The drawee must, therefore, act within twenty-four hours from the date of the delivery of the bill, whether his action be an acceptance or refusal.

3 R. C. L. 1309; *Wisner v. Bank of Gallitzin*, 220 Pa. St. 21.

§ 225. Liability of drawee retaining or destroying bill. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

Variant.—The Illinois statute omits this section. The Wisconsin statute adds, "Mere retention of the bill is not an acceptance." The Pennsylvania statute adds the following proviso, "Provided that the mere retention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance; and provided further that the provisions of this section shall not apply to checks."

This section applies only to cases in which the acts of the drawee are of a tortious character, and imply an unauthorized conversion of the bill by the drawee, and not to cases in which the bill is willingly left in the hands of the drawer by the holder, and no demand therefor is made.

Matteson v. Moulton, 11 Hun. 268; 79 N. Y. 627; *Westburg v. Chicago Coal Co.*, 117 Wis. 589.

The defendant received three checks in payment of goods, drawn upon a branch of plaintiff's bank. The following day the defendant deposited the checks in the Corn Exchange Bank, which presented them through the clearing house where they were credited to the Corn Exchange Bank and debited to the plaintiff. The checks turned out to be worth-

less. Held, though the recognition of the checks at the clearing house was merely an assumption of their genuineness, subject to future examination, and the arrival of the checks at plaintiff's branch bank was their first presentation for payment, yet a check is a bill of exchange payable on demand, and a drawee is deemed to have accepted the same if he does not return it within twenty-four hours after its delivery for acceptance, as provided by Sections 321, 325.

State Bank v. Weiss, 46 Misc. 93; *First National Bank v. Bank*, 154 S. W. 967.

The word "refuses" as used in this section, does not mean a tortious refusal, nor does it imply that a previous demand for the return of the check to the holder shall be made. The word is to be construed so as to cover a failure or neglect to return the check.

Wisner v. First National Bank, 220 Pa. St. 21; *Westberg v. Chicago Lumber Co.*, 117 Wis. 589; 94 N. W. 572; *Matteson v. Moulton*, 11 Hun. 268; affirmed 79 N. Y. 627; *State Bank v. Weiss*, 91 N. Y. 276.

The holder of a draft delivered to the drawee for acceptance, in order to raise a presumption of acceptance by the drawee's destruction thereof, or a refusal to return as provided by this section, must show that the drafts were negotiable, or of a nature and kind that could be presented for acceptance, or that they were actually delivered to the trustee for acceptance.

First National Bank v. Whitmore, 177 Fed. 397.

§ 226. Acceptance of incomplete bill. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

A bill or note does not lose its negotiable character by being dishonored, and the indorsement although made after dishonor, follows the nature of the original contract and is negotiable unless it contains express words of restriction.

Leavitt v. Putnam, 3 N. Y. 494.

The right of a holder of a draft to recover of the acceptor thereof is not affected by the fact that such acceptance was an accommodation one, nor by the fact that he discounted the draft before acceptance.

Iselin v. Chemical National Bank, 16 Misc. 437; *Mechanics Bank v. Livingston*, 33 Barb. 458; *Bank of Louisville v. Ellery*, 34 Barb. 630.

§ 227. **Kinds of acceptances.** An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In *Niagara District Bank v. Fairman, etc. Mfg. Co.*, 31 Barb. 403, the defendant, which was sued as the drawer of a bill of exchange, was a corporation, located in Rochester, N. Y. The bill, upon which the action was based, was drawn on A. Yerrington & Co., and addressed to that company at Cobourg, in Upper Canada. The bill was accepted by the drawee, payable at the Bank of Upper Canada, a place about ten miles distant from Cobourg.

In holding that the drawer had been discharged the court said: "If the Bank of Upper Canada, where this bill was made payable by the acceptors, was located in the same city, or town, or village where such acceptors resided, according to the case of *Troy City Bank v. Lauman*, 19 N. Y. 477, the acceptance payable at such a bank would have been entirely proper. Such acceptance is not a departure from the tenor of the bill. It merely fixes a place of payment for the mutual convenience of the acceptors and the holder, and can work no possible injury to the drawer or indorsers, as it will not affect the time for the presentment of the bill to or for the service of notice of non-payment on the parties entitled to such notice. But an acceptance of a bill at a different place from that of the residence of the drawee, by necessary implication from this case of the *Troy City Bank v. Lauman*, must be a material departure from the bill. This must be so upon principle. The acceptance becomes a part of the bill, and any material variance from the tenor and import of the bill, made in the terms or manner of the acceptance, taken or assented to by the holder, must be at his own risk and must discharge the drawer, if due presentment is not afterwards made at the proper place and due notice given of the non-payment of the bill. * * * The bill of exchange in this case was not properly presented for payment at the Bank of Upper Canada, Port Hope, so as duly to protest it for non-payment, as against the drawers, but it should have been presented personally to the acceptor, at Cobourg. It not having been so presented and notice of non-payment duly given, the drawers were not properly charged by the notice given, and are not liable on the bill."

Sec. 228.

See notes, Sec. 130.

§ 228. **What constitutes a general acceptance.** An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

§ 229. **Qualified acceptance.** An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

An instrument not under seal may be delivered upon conditions, the observance of which as between the parties is essential to its validity; that the operation of the instrument may be limited by the conditions upon which the delivery was made; that parol evidence of such conditions is not open to the objection of varying or contradicting a written contract, and that the rule applies to the enforcement of negotiable paper, not only as between the original parties, but as to others having notice.

Higgins v. Ridgway, 153 N. Y. 130; Tradesmen's National Bank v. Curtis, 38 App. Div. (N. Y.) 240; Bookstaver v. Jayne, 60 N. Y. 150.

The drawer or indorser of a bill of exchange, specifying the place of payment only by its address to the drawee at a city named, is not discharged by its acceptance payable at a particular bank in that city, as no possible injury can result to the drawer or indorser.

Troy City Bank v. Lauman, 19 N. Y. 481.

A conditional acceptance is not enforceable until complete fulfillment of the conditions.

Ford v. Angelrodt, 88 Am. Dec. (Mo.) 174.

The following acceptance was held to be conditional: "Accepted, payable at Lloyd's Bank, Ltd., London, against indorsed bills of lading for 8,417 bushels of flax seed per Buffalo S. S. at New York and Certificate of Insurance, \$8,500."

Guaranty Trust Co. v. Grotian, 114 Fed. Rep. 433; see also Stevens v. Androsocgin, 62 Me. 498.

If a written acceptance was delivered to the plaintiff upon an oral condition, assented to by him, that it was not to become operative, or have any existence at all as an acceptance, until the happening of a condition, that condition, if proved, has been held to avail the defendant, and under proper pleadings evidence of such conditional delivery is admissible.

Schmittler v. Simon, 114 N. Y. 176; *Burns Lumber Co. v. Doyle*, 71 Conn. 742.

In a telegram to a party, in relation to a draft, that the person sending the despatch "will pay B's draft, twenty-three hundred dollars, for stock," the words "for stock" subserve no purpose as between the payee and acceptor. At most, those words are but an indication of the nature of the consideration as between the drawer and acceptor.

State Bank v. Bradstreet, 89 Neb. 188.

§ 230. Rights of parties as to qualified acceptance. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

Where the holder of a bill of exchange transmits it to its agent for presentment to the drawee, such agent has no right to receive anything short of an explicit and unequivocal acceptance, without giving notice to the holder, as in case of non-acceptance; and he will be liable for any loss the holder may sustain in consequence of his right so to do. The rule which holds an agent to be bound by the terms of the contract, where he fails to bind his principal, is confined to cases where such failure arises from want of authority in fact to make the contract. Where, therefore, a draft drawn by the "Empire Mills" upon E. C. Hamilton was forwarded to a bank for presentment, and the drawee wrote across the draft "Accepted, Empire Mills by E. C. Hamilton, Treas." it was held, that such acceptance bound neither the drawee nor the Empire Mills, and that the bank having omitted to protest the bill was liable to the holder, upon the insolvency of the drawer and indorsers, for the amount of the bill.

Walker v. Bank of State of N. Y., 9 N. Y. 582.

ARTICLE 13**Presentment for Acceptance**

Section 240. When presentment for acceptance must be made.

241. When failure to present releases drawer and endorser.

242. Presentment; how made.

243. On what days presentment may be made.

244. Presentment where time is insufficient.

245. When presentment is excused.

246. When dishonored by non-acceptance.

247. Duty of holder where bill not accepted.

248. Rights of holder where bill not accepted.

§ 240. When presentment for acceptance must be made.

Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

When a bill is made payable at a day certain at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers; it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his

debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection.

Allen v. Suydam, 17 Wend. 368; National Park Bank v. Saitta, 127 App. Div. (N. Y.) 628.

A bill payable at a fixed time from its date may be presented for acceptance at any time.

Bachellor v. Priest, 12 Pick. 399; Oxford Bank v. Davis, 4 Cush. 188.

Presentment of a negotiable instrument for acceptance is distinct and different presentment for payment, since presentment for payment cannot be made until the instrument presented is due, while presentment for acceptance must be made before maturity.

National Bank of Omaha v. Whitmore, 177 Fed. 398.

All contracts, including negotiable instruments, are as to their validity, nature, interpretation and effect governed by the law of the state or country where they are made and are to be executed. If, however, they are made in one state or country, but are to be executed in another state or country, then they are governed by the law of the state or country where they are to be performed. Presentment of negotiable paper must, therefore, be made in accordance with the interpretation as to its character extended to the instrument by such foreign law.

Westlake Inter. Law, Sections 110, 163, 169; Everett v. Vendryes, 19 N. Y. 436; Dickinson v. Edwards, 77 N. Y. 573; U. National Bank v. Chapman, 169 N. Y. 538; Spies v. National City Bank, 174 N. Y. 222; Stumpf v. Hallahan, 101 App. Div. (N. Y.) 383.

§ 241. When failure to present releases drawer and indorser. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

This section makes no change in the rule at common law.

Gowen v. Jackson, 20 Johns 176; Robinson v. Ames, 20 Johns 146; Wallace v. Agry, 4 Mason 333; Phoenix Ins. Co. v. Allen, 11 Mich. 30; Allen v. Suydam, 20 Wend. 321.

Where a bank receives from the owner a bill for collection, payable either at the place where such bank carries on its business, or at some distant place, it thereby becomes the agent of the owner for the collection, and in the discharge of its obligations as such, if the bill has not been accepted, it is bound to present the same for acceptance without

unreasonable delay, as well as to present the same for payment when it becomes payable; and if not accepted when presented for that purpose, or not paid when presented for payment, it must take such steps by protest and notice as are necessary to charge the drawer and indorser, or it will be liable to its principal, the owner, for the damages which the latter sustains by any neglect to perform such duties, unless there be some agreement to the contrary, express or implied. And if it be necessary or convenient for the bank to employ some other bank or individual to collect the bill, either at the place of its location, or at a distant place where the bill is payable, and it does employ another bank or individual to whom it transmits the bill for that purpose, the latter on receiving the bill and entering upon the discharge of the trust, becomes the agent for the former bank and not of the owner, and in the absence of any agreement to the contrary is answerable to it for any neglect in the discharge of its duties as agent whereby the former bank sustains any loss or damage. The principle is that when a trust is confided to an agent, and he whose interest is intrusted is damaged by the neglect of one whom the agent employs in the discharge of the trust, the agent employed shall answer to the person damaged.

Montgomery Co. Bank v. Albany City Bank, 9 N. Y. 460.

A draft payable on demand should be presented for payment, and if not paid, notice of non-payment should be given to the drawer within a reasonable time. Where, however, the drawer of a draft is the treasurer of the drawee, a corporation, and he, with full knowledge of the facts, some years after the draft was made, makes a partial payment thereon and promises to pay a balance due upon it, there is a waiver of any defect in presentation or notice of dishonor.

Linthicum v. Caswell, 19 App. Div. (N. Y.) 341.

Where the payee of a draft, on the day of its receipt by him, and in banking hours, presents and surrenders it to the drawee and receives therefor the drawee's check, which check had it been presented to the bank on that day, would have been paid, and on the next day the check is presented to the bank for payment and payment refused, and the drawers of the draft at once advised by letter of the non-payment of the check. Held, that the check could be operative as only by express agreement; but that although as between the said drawee and payee, the payee was not bound to present the check until the day after its receipt by him, yet that between the drawers and payee of the draft, it was the duty of the payee to present the check at once, and he was guilty of laches in not doing so, and was chargeable with the consequent loss.

Smith v. Miller, 43 N. Y. 171.

A delay of the mail is a sufficient excuse for the omission to immediately present a bill for acceptance, and a presentation immediately upon its reception, is in time to charge the indorser.

Walch v. Blatchley, 6 Wis. 422.

§ 242. Presentment; how made. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

See Sections 170, 172, 245.

Presentment is a term which requires but little explanation. Anything which amounts to a notification of the holding of the bill, with a request to accept, accompanied by the bill, will amount to a presentment. No formal presentment is necessary, or rather there is no form for a presentment. The bill explains itself, and the object is understood in the mercantile community, when it is shown and an answer required. So where bills are transmitted by letter to the drawee, this is good presentment, and an answer by him that he has not accepted will be a refusal, which will make it necessary to protest and give notice. There is no rule requiring that a bill of exchange must be actually shown to the drawee, in order to effectuate a valid and binding acceptance.

3 R. C. L. 1317; Fisher v. Beckwith, 46 Am. Dec. 174.

The reason for the exception of partners in Subdivision 1 rests upon the fact that partners are but one person to legal contemplation; that each partner, acting in such capacity, is not only capable of performing what all can do, and of receiving and paying out that which belongs to all, but by such acts necessarily binds them all; that, as incident to such joint relations, all of the partners are affected by the knowledge of one.

These things do not pertain to the relations of joint makers or acceptors who are not partners. Hence, while a demand of one partner is equivalent to a demand of all, a demand of one of joint makers, not partners, is not.

Story on Prom. Notes, Sec. 255; *Gates v. Beecher*, 60 N. Y. 523.

As to the diligence in making presentment, see *Holtz v. Boppe*, 37 N. Y. 634; *Reed v. Speer*, 107 App. Div. (N. Y.) 144.

Where the maker of a note calls on the holder on the day it becomes due and informs him that he is unable to pay, and requests him to so inform the indorsers, this is a sufficient demand and refusal to constitute a dishonor of the note.

3 R. C. L. 1171.

§ 243. On what days presentment may be made. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two and one hundred and forty-five of this chapter. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

Variant.—The statutes of Arizona, Kentucky and Wisconsin omit the last sentence. The Colorado statute substitutes for the last sentence as follows: "When any day is in part a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday." The North Carolina statute omits the word "otherwise" in the last sentence.

§ 244. Presentment where time is insufficient. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

Reasonable time usually is a question of law under the circumstances of each case.

Aymar v. Beers, 7 Cow. 705; *Linthicum v. Caswell*, 19 App. Div. (N. Y.) 541.

§ 245. When presentment is excused. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;
2. Where, after the exercise of reasonable diligence, presentment can not be made;
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

Subdivision 2 is analogous to cases where presentment for payment is excused. See Sec. 142.

This section clears up all doubt existing before its adoption in cases where the drawee is dead.

See Dan. Neg. Inst. Sec. 1178.

Where on presentment of a bill of exchange for payment at the acceptor's usual place of business, within proper hours, the notary finds the doors closed, he is justified—nothing further appearing—in protesting the bill for non-payment without inquiry for the acceptor at his residence, and without making further effort to find him.

Sulzbacher v. Bank, 86 Tenn. 201; *Baumgarden v. Reeves*, 35 Penn. 250; *Wisconsin v. Chiapella*, 23 How. U. S. 368.

The payee of a check is relieved from the necessity of making presentation and demand if the drawee had no deposit in the bank.

Culver v. Marks, 122 Ind. 544; *Carroll v. Sweet*, 128 N. Y. 19, 13 L. R. A. 43.

§ 246. When dishonored by non-acceptance. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this chapter is refused or can not be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

§ 247. Duty of holder where bill not accepted. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Where a bill is made payable at a day certain at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers; it is the owner's interest that the bill should be accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection.

Allen v. Suygam, 17 Wend. 368; National Park Bank v. Saitta, 127 App. Div. (N. Y.) 628.

§ 248. Rights of holder where bill not accepted. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

ARTICLE 14

Protest

Section 260. In what cases protest necessary.

- 261. Protest; how made.
- 262. Protest; by whom made.
- 263. Protest; when to be made.
- 264. Protest; where made.
- 265. Protest both for non-acceptance and non-payment.
- 266. Protest before maturity where acceptor insolvent.
- 267. When protest dispensed with.
- 268. Protest where bill is lost or destroyed or wrongly detained.

§ 260. In what cases protest necessary. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

As to the distinction between foreign and inland bills see Section 213.

The failure to protest a foreign bill on the day it was dishonored, as required by Section 263, operates under this section to discharge the maker and indorsers from liability.

Amsick v. Rogers, 103 App. Div. (N. Y.) 429; *Freese v. Brownell*, 35 N. J. L. 285.

Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

Williams v. Paintsville Bank, 137 S. W. 535.

There are several reasons why protest as provided by this section is necessary: (a) for the sake of uniformity in international transactions; (b) because it affords satisfactory evidence of dishonor to the drawer, who from his residence abroad, might experience a difficulty in making inquiries on the subject and be compelled to rely on the representations of the holder; (c) because, as foreign courts give credit to the acts of a public functionary, the protest affords the most satisfactory evidence to charge an antecedent party.

Byles 256.

While as to certain details, such as the days of grace, the manner of making the protest, and the persons by whom the protest shall be made, the law or custom of the place where it is payable will govern; the necessity of making a demand and protest, and circumstances under which the same may be required or dispensed with, are incidents of the original contract which are governed by the law of the place where the bill is drawn, rather than the place where it is payable.

Amsick v. Rogers, 189 N. Y. 258; *Price v. Page*, 24 Mo. 65; *Hunt v. Standart*, 15 Ind. 33, 38; *Raymond v. Holmes*, 11 Texas, 54, 59; *Powers v. Lynch*, 3 Mass. 77, 80.

The damages recoverable by the payee of a negotiable foreign bill of exchange protested for non-payment against the drawer, may be deemed to be made up as follows: (1) The face of the bill; (2) Interest thereon; (3) Protest fees; (4) Re-exchange, i.e., the additional expense of procuring a new bill for the same amount payable in the same place on the day of dishonor; or a percentage in lieu of re-exchange where it is prescribed by statute.

Pavenstedt v. N. Y. Life Ins. Co., 203 N. Y. 95; 2 *Sedgwick on Damages* (8th ed.) 700; *Byles on Bills*, 418; *Bank of United States v. United States*, 2 How. (U. S.) 745; *Lee & Co. v. Walbridge*, 19 N. Y. 134.

The provisions of this section, which require protest and due notice as a condition of the liability of both the drawer and indorsers of a foreign bill of exchange, apply to a check drawn and given in the State of New York on a bank in Austria, and the failure of the holder to protest the check discharges the drawer.

Casper v. Kuhns, 79 Misc. 411.

Formal protest by a notary where the instrument is not a foreign bill is not necessary to hold the indorser. It is mere proof. What is essential is presentment and demand at the time and place provided for in the instrument, followed by notice to the indorser of such presentment, demand and non-payment.

McBride v. Illinois National Bank, 138 App. Div. 346.

§ 261. Protest; how made. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Protest is a solemn declaration, written by a notary public under a fair copy of a bill or note, stating that acceptance has been refused, the reasons, if any, therefor, and that the bill or note has been protested. Protest, strictly speaking, is absolutely necessary only in case of foreign bills, i.e., while it is necessary to give notice of dishonor of all negotiable paper, this need be done before a notary only in case of foreign bills.

But by Section 189, ante, protest is authorized in the case of all negotiable instruments, and it is the usual way to give notice of dishonor. This method of notice has great advantages because the certificate of the notary is usually prima facie evidence. The form or contents of a protest is the time and place of presentment, the demand of payment, the fact and manner of presentment, the fact of dishonor, the name of the parties by whom and to whom presentment was made. A protest is the formal document; notice of protest is simply notice that the instrument has been dishonored and protested. Protest for better security is where the holder protests when the drawee of the bill of exchange has absconded before the day of maturity, or where the drawer or acceptor of a foreign bill has become insolvent. It is not necessary in order to bind the drawer or indorser, and seems to be principally used to enable drawer and indorser to provide for payment when due.

Chitty on Bills, 383.

The notice should positively identify the paper.

Home Ins. Co. v. Green, 19 N. Y. 518.

A notice of protest to an indorser, dated the day the note is payable, and which states the amount and the names of the maker and indorser, is sufficient description of the note, in the absence of proof that any other note existed to which the notice might refer. A statement in such notice, that the note is protested for non-payment, is sufficient notice of a presentment and demand of payment at the time and place for payment.

Youngs v. Lee, 12 N. Y. 551.

Protest should designate or identify the instrument to which it refers, which is usually done by putting on it a copy thereof, but if the original instrument be annexed and referred to in the body of the protest, it is sufficient.

Fulton v. Maccracken, 81 Am. Dec. (Md.) 620.

A notary omitting to affix his seal may supply the defect by attaching his seal after objection has been made to its absence.

Rindskoff v. Malone, 74 Am. Dec. (Ia.) 367.

The certificate must be executed under the seal of the notary making it.

Pierce v. Indseth, 106 U. S. 546.

According to the weight of authority a notarial seal renders a certificate of protest evidence in foreign countries, and in the absence of such a seal extraneous evidence must be given of the authority of the officer to take the protest.

London R. P. Bank v. Carr, 54 Misc. 94; *Bank of Rochester v. Gray*, 2 Hill 227.

A notary's protest is not conclusive, but only *prima facie* evidence of such facts as are proper to be stated in it; it may always be rebutted by other evidence showing how the demand was made, or that proper diligence was not used to make it, or that there was a permanent abandonment and removal to another place of business in the same city.

3 R. C. L. 1339; *Clough v. Holden*, 115 Mo. 336; *Sulzbacher v. Bank*, 6 S. W. Tenn. 129; *Tate v. Sullivan*, 96 Am. Dec. (Md.) 597; *Rosen v. Carroll*, 16 S. W. (Tenn.) 66; 12 L. R. A. 727; *Johnson v. Brown*, 154 Mass. 105.

The notice of protest need not be signed manually by the notary if his name appears at the foot of the notification. It as fully acquaints the indorser of the dishonor as would the manuscript signature of a person whose handwriting he did not know; and it certainly is not expected that the indorser should know the handwriting of the notary.

Bank of Cooperstown v. Woods, 28 N. Y. 567.

A certificate of protest in the following form: "I, John Doe, a notary public, do hereby certify that I have this day protested for non-payment, the annexed bill," even though properly dated and signed, is insufficient; a specification of the place and manner of presentment, and the person to whom presentment was made being necessary to bind the indorsers.

Union Bank v. Williams Co., 117 Mich. 535; People's Bank v. Brooke, 31 Md. 7; Duckert v. Von Lileinthal, 11 Wis. 55.

The protest of a promissory note, stating that the notary went with the original note and demanded payment thereof, at the promisor's office at a place named, and that the person in charge answered "no funds" is sufficient in form.

Legg v. Vinal, 165 Mass. 555.

A certificate of a notary, which states that he presented a note for payment at Montello and demanded payment, which was refused, but did not state to whom or at what place in the town it was presented, does not show such a presentation to the maker as will bind the indorser.

Duckert v. Leinthal, 11 Wis. 56.

CERTIFICATE OF PROTEST

STATE OF.....
COUNTY OF..... } ss.

*Be it KNOWN, that on the.....day
of....., in the year of our Lord nineteen
hundred and seventeen, I,
a Notary Public, duly commissioned and sworn, and residing at.....
....., in said County and State, at the request
of.....Bank,
of....., went with the original instru-
ment, which is hereto attached to.....
and presented it to the person in charge, and demanded payment thereon,
which was refused; because.....
Whereupon, I, the said Notary, at the request of the aforesaid.....
.....Bank did PROTEST, and by
these presents do SOLEMNLY PROTEST, as well against the makers of
said instrument, the indorsers thereof as all others whom it doth or may
concern, for exchange, re-exchange and all costs, charges, damages and interest
already incurred by reason of the non-payment or non-acceptance of said
instrument.*

And I, the said Notary, do hereby certify that due notice of such protest as provided by law was put in the post office at....., as follows:

Notice for John Doe & Co., Boston, Mass.

Notice for Richard Roe, Chicago, Ill.

Notice for

Notice for

Each of the above named places being the reputed place of residence of the person to whom such notice was directed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

.....
Notary Public.

NOTICE OF PROTEST

STATE OF..... }
COUNTY OF..... } ss.

.....19.....
To.....

*You will please take notice that a.....for
.....dollars, dated.....,
payable.....after.....drawn by
.....in favor of.....
on.....(accepted by).....
endorsed by you and due.....has been pro-
tested by me on this day for non-....., after having made
legal demand for the same.*

*I hereby, at the request of.....the holder
thereof, notify you that the said holder looks to you for payment, damages,
interest and costs.*

Yours, etc.,

.....
Notary Public.

§ 262. Protest; by whom made. Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Variant.—The word “responsible” is substituted for “respectable” in Subdivision 2 in the Washington statute.

A cashier of a bank who is a notary may legally protest his own note which has been discounted by the bank.

Dykman v. Northbridge, 1 App. Div. (N. Y.) 26.

And so too may a stockholder or an officer of a bank, who is a notary, protest paper belonging to the bank.

Moreland v. Citizens Bank, 97 Ky. 211; *Nelson v. Bank*, 69 Fed. 798; *Patton v. Bank of Lafayette*, 53 S. E. (Ga.) 664; *Herkimer Co. Bank v. Cox*, 21 Wend. (N. Y.) 119.

A notary cannot delegate his authority, he must make the presentment and demand himself, and if these duties are performed by his clerk the protest is invalid.

Carmichael v. Bank of Penn., 35 Am. Dec. 408.

§ 263. Protest; when to be made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

It is not essential that the certificate be made out at the time of protest. If a note or memorandum is made by the notary at the time of the presentment and dishonor of the instrument showing what was done, a certificate thereafter drawn up from that memorandum would be sufficient even though six months elapsed.

Union National Bank v. Williams, 117 Mich. 535; *Byles on Bills*, 257; *Mooreland v. Citizens Bank*, 114 Ky. 577; 71 S. W. 520; 61 L. R. A. 900.

Where an instrument falls due on Sunday, payment thereof cannot be required, nor protest made, on the preceding Saturday, but presentment and protest should be made on the following Monday unless it is a legal holiday.

Hirshfield v. Ft. Worth National Bank, 18 S. W. (Tex.) 743; 15 L. R. A. 639.

The failure to protest a foreign bill on the day it was dishonored, as required by this section, operates under Section 260 to discharge the maker and indorsers.

Amsick v. Rogers, 103 App. Div. (N. Y.) 429.

§ 264. Protest; where made. A bill must be protested at the place where it is dishonored, except that when a bill

drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Protest is generally to be made at the place where the dishonor occurs. If a bill is drawn on a person in one place, and is payable in another, then it has been held that the holder has his election to cause the bill to be protested for non-payment either at the place of payment or at the place where the drawee resides.

3 R. C. L. 1322; 43 Am. Dec. 221; Byles on Bills, 257; Dan. Neg. Inst. Section 935.

§ 265. Protest both for non-acceptance and non-payment. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 266. Protest before maturity where acceptor insolvent. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

See notes, Section 260.

§ 267. When protest dispensed with. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Generally an excuse for non-protest will be such as arises from circumstances not affecting the individual particularly, but having a general influence over the whole community so as to prevent and impede the transaction of business, as, for instance, the breaking out of a general war, or the prevalence of a malignant epidemic, or an overwhelming calamity.

For a discussion on the subject, see Dan. Neg. Int., Section 730.

As in the case of presentment for payment and notice of dishonor, protest may be waived by the indorser, either orally or in writing, or by acts clearly calculated to mislead the holder and prevent him from treating the instrument as he otherwise would.

3 R. C. L. 1320; Burgettstown National Bank v. Nill, 213 Pa. St. 456; Manning v. Maroney, 87 Ala. 563; 6 So. 343; 3 L. R. A. 1079; Baker v. Scott, 29 Kan. 136; 44 Am. Rep. 628; Rose v. Hurd, 71 N. Y. 14; Bellinger v. Glenn, 80 Ala. 190; 60 Am. Rep. 98.

§ 268. Protest where bill is lost or destroyed or wrongly detained. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

The defendant bank received checks from a depositor and credited them to his general account. The checks were forwarded for collection but were lost in the mail. After the failure of the drawer of the checks, the defendant bank charged them back against the depositor's account. It was held that the defendant was not entitled to charge the checks back in this manner, and that it must bear the loss itself.

Heinrich v. Middletown Bank, 164 App. Div. 960; 112 N. E. Rep. 531; affirmed by Court of Appeals.

In Albi v. Bank of Evansville, 124 Wis. 78, the court held, "Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purpose of immediate presentment, defendant had the opportunity and owed the duty to at once make substituted presentment and demand by means of a copy of sufficient description, and in case of non-payment to give notice to the indorser.

Where a note is lost, a tender of a bond of indemnity is not necessary to a right of action on the note.

Church v. Stevens, 56 Misc. 572. See also, Shipsey v. Bowery Bank, 59 N. Y. 487; Hinsdale v. Miles, 5 Cobb. 336.

INDEMNITY BOND TO BANK IN PAYING LOST DRAFT

KNOW ALL MEN BY THESE PRESENTS,

*That we,of.....
principal, and.....of.....,
as surety, are held and firmly bound unto.....
Bank in the sum of \$....., lawful money of the United
States, to be paid to said.....Bank, or*

its certain attorneys or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

*Sealed with our seals and dated the.....day of
....., 19.....*

*THE CONDITION of this obligation is such that whereas the said
.....Bank at the request of.....
did, on or about the.....day of.....,
1917, issue its draft for \$.....on the.....
.....Bank of....., dated
the.....day of.....1917, and payable
to the order of....., which draft has
been lost before presentment for payment, and Whereas, the said.....
.....Bank has issued its duplicate draft in
lieu of said lost draft upon the agreement of this bond of indemnity be given.*

*Now therefore, if the said.....,
principal, and.....surety, their execu-
tors or administrators, or either of them, shall and do deliver the said draft
unpaid when found to the said Bank or its successors or assigns to be can-
celled, and until the same shall be so delivered and cancelled, to save, keep
harmless and indemnify the bank or its assigns of and from any obligation
incurred by the issuance of said draft, and from all actions, suits, payments,
costs and damages for or by reason thereof, then this obligation to be void and
of no effect, otherwise to remain in full force and virtue.*

.....(Seal)
.....(Seal)

STATE OF.....}
COUNTY OF.....} ss.
CITY OF.....}

*On this.....day of.....19.....,
before me, the subscriber, personally appeared.....
and....., to me known to be the same
persons who executed the foregoing instrument, and they each acknowledged
to me that they executed the same.*

.....
Notary Public.

INDEMNITY BOND FOR PAYING A LOST NOTE

KNOW ALL MEN BY THESE PRESENTS,

That we, A, principal, ofand B, surety, of.....are held and firmly bound unto C, of.....in the penal sum of, lawful money of the United States, to be paid to the said C, his executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated the.....day of.....19.....

THE CONDITION of this obligation is such that whereas A, principal, is the owner of a certain promissory note, dated the.....day of, for \$....., and payabledays after date, signed and made by.....and payable to the order of....., due, and which said note has been lost and cannot now be produced by him and

Whereas, said C, has this day paid to said A, the full amount due thereon upon the agreement that this bond of indemnity would be given and that said A, principal, and B, surety, will indemnify and save C harmless, and will deliver up said note to C, when found.

Now, THE CONDITION of this obligation is such that the above bounden A, principal, and B, surety, their heirs, executors, administrators or any of them shall well and truly indemnify and save harmless the said C, his executors and administrators from and against any claim on said note and any and all damages, costs, charges, actions or suits by reason thereof, and also deliver or cause said note to be delivered to said C, if found, then this obligation to be void, otherwise to remain in full force and virtue.

.....(Seal)

.....(Seal)

(Acknowledgement as in the foregoing form)

ARTICLE 15

Acceptance for Honor

Section 280. When bill may be accepted for honor.

281. Acceptance for honor; how made.

282. When deemed to be an acceptance for honor of the drawer.

283. Liability of acceptor for honor.

284. Agreement of acceptor for honor.

285. Maturity of bill payable after sight; accepted for honor.

286. Protest of bill accepted for honor or containing a reference in case of need.

287. Presentment for payment to acceptor for honor; how made.

288. When delay in making presentment is excused.

289. Dishonor of bill by acceptor for honor.

Note.—An acceptance *supra* protest, or for honor, is when, upon the refusal of the original drawee to accept the bill, a stranger accepts for the honor of some one of the parties thereto. He declares before a notary public that he accepts the protested bill and that he will pay it at the appointed time; he then subscribes his name with the words, "accepted *supra* protest for the honor of A. B." The nature of the acceptor's undertaking in that respect is like an indorser, to the effect that if the drawee does not pay the bill when again presented to him, he will pay upon maturity. Any third person may accept *supra* protest; even the drawee, unless he is bound to accept the bill in the first instance in good faith for the benefit of all parties. The holder of a bill accepted *supra* protest should again protest it for non-payment, and then present it to the acceptor *supra* protest; if he refuses to pay, there must be another formal protest stating presentment to original drawee and his non-payment, the protest of the bill and its presentment to the acceptor *supra* protest, the

demand of payment from him and protest for his non-payment. A notice must be forthwith given to the drawer and the indorsers. The acceptor *supra* protest, it is said, does not admit the genuineness of the signature of any party, and, therefore, he may recover money paid if the bills turn out to be forgery. This is not presumed to be so if the bill has passed into the hands of a *bona fide* purchaser.

The subsequent sections are taken from the English Bills of Exchange Act, Sections 65 to 68.

§ 280. When bill may be accepted for honor. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

§ 281. Acceptance for honor; how made. An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ 282. When deemed to be an acceptance for honor of the drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 283. Liability of acceptor for honor. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

As to the rights of an acceptor for honor, he has recourse against the party for whose honor the acceptance was made, and all parties against whom the latter would have recourse, for all damages incurred by reason of his acceptance. If the drawee accepts *supra* protest, he stands in the position of an indorsee, paying full value for it, has the same remedies

to which an indorsee would be entitled against all prior parties, and can of course, sue the drawer or indorser.

Swope v. Rose, 40 Pa. St. 186, 80 Am. Dec. 567.

§ 284. Agreement of acceptor for honor. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

In order to render the acceptor supra protest liable, the holder is bound in the first instance to demand payment of the original drawee when the bill becomes due, and if he fails to pay, it must then be presented in due time to the acceptor supra protest. If the latter refuses to pay on such presentment, there must be another formal protest, stating the presentment for payment to the drawee, the protest for his non-payment, the presentment of the bill and acceptance to the acceptor supra protest, demand of payment of him and the protest for his non-payment; and notice thereof must be forthwith forwarded to the drawer and indorsers. If the acceptance is for the honor of a particular party, and the holder takes it, he cannot sue that party before maturity of the bill, and its dishonor by such acceptor; and if the acceptance is generally for the honor of the bill, the holder cannot sue any of the parties before its maturity and dishonor. The acceptance inures to the benefit of all the parties subsequent to him and for whose honor it was made.

§ 285. Maturity of bill payable after sight; accepted for honor. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 286. Protest of bill accepted for honor or containing a reference in case of need. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 287. Presentment for payment to acceptor for honor; how made. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.

§ 288. When delay in making presentment is excused. The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 289. Dishonor of bill by acceptor for honor. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE 16**Payment for Honor**

Section 300. Who may make payment for honor.

301. Payment for honor; how made.

302. Declaration before payment for honor.

303. Preference of parties offering to pay for honor.

304. Effect on subsequent parties where bill is paid for honor.

305. Where holder refuses to receive payment *supra* protest.

306. Rights of payer for honor.

§ 300. Who may make payment for honor. Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

3 R. C. L. 1332; 92 Am. Dec. 570, 579.

See Dan. Neg. Inst., Section 1254.

Contrary to the general rule as to voluntary payments by a stranger without request of the debtor, a stranger may pay a negotiable bill of exchange for the honor of any one of the parties, and become thereby subrogated to the rights of the holder to the extent that he may recover against the person for whose honor he pays, and all parties prior thereto. He is also subrogated to the rights and remedies of the party for whose honor he pays, but this right of payment *supra* protest is not extended to promissory notes.

§ 301. Payment for honor; how made. The payment for honor *supra* protest in order to operate as such and not as a

mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

The method of accepting for honor is as follows: The acceptor for honor personally appears before a notary public with witnesses, and declares that he accepts such protested bill in honor of the drawer or indorser, as the case may be, and that he will satisfy it at the time appointed. He then subscribes his name to the words following: "Accepted *supra* protest in honor of A. B.," or, more usually, "Accepts S. P." An acceptance for honor *supra* protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. An agreement on the part of a stranger to the bill to pay it at maturity if the drawee does not is an acceptance for honor or an acceptance *supra* protest. There can be an acceptance for honor only when the bill has been protested; and it is at the election of the holder to take or refuse an acceptance for honor. The acceptance may be for part only of the sum for which the bill is drawn. It is well settled that a stranger or one not a party to the bill may accept for honor; and the drawee himself may accept for the honor of the drawer or of an indorser. And different persons may be acceptors *supra* protest for the honor of different parties to the bill. The party for whose honor the bill is accepted should be designated; and the acceptor *supra* protest must at once give notice of his acceptance to the person for whose honor it is made.

3 R. C. L. 1331; 7 L. R. A. 209; *Swope v. Ross*, 40 Pa. St. 186; 80 Am. Dec. 567; 92 Am. Dec. 579 and Note.

§ 302. Declaration before payment for honor. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 303. Preference of parties offering to pay for honor. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 304. Effect on subsequent parties where bill is paid for honor. Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are dis-

charged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

§ 305. Where holder refuses to receive payment supra protest. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 306. Rights of payer for honor. The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

A stranger who pays supra protest for the honor of the bill generally is to be considered as an indorsee paying full value, and he is entitled to recover against all the parties to the bill. If payment has been made for the honor of a particular indorser, the payer may sue him and all prior parties, but not subsequent indorsers, the latter being discharged by such payment. But, if a person takes up a bill for the honor of the drawer, he has no right of action against the acceptor, if he accepted it for the accommodation of the drawer, the reason given being that if the drawer had taken it up himself, no action would lie upon it, and a third person taking it up for him must occupy the same position. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

3 R. C. L. 1333; McDowell v. Cook, 45 Am. Dec. 289; Smith v. Sawyer, 92 Am. Dec. (Me.) 576.

ARTICLE 17**Bills in Sets**

Section 310. Bill in sets constitutes one bill.

- 311. Rights of holders where different parts are negotiated.
- 312. Liability of holder who indorses two or more parts of a set to different persons.
- 313. Acceptance of bills drawn in sets.
- 314. Payment by acceptor of bills drawn in sets.
- 315. Effect of discharging one of a set.

§ 310. Bill in sets constitutes one bill. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

Where the holder declares upon one of a set of exchange, it is not necessary to account for the non-production of the rest; any ground of defense which may arise in reference to another of the set, it devolves on the defendant to make.

Hazzard v. Shelton, 15 Ala. 62.

In *Downes & Co. v. Church*, 13 Pet. (U. S.), 205 (10 L. Ed. 127), it was decided, that where the holder of one of a set of exchange, which has been protested, and due notice thereof given to the indorser, brings an action thereon or against the drawer, and upon the trial produces the bill to which the protest is attached, it is not incumbent upon him to produce or account for the non-production of the other parts of the set. The law will not presume that the other bills of the set have been negotiated to other persons, merely because they are not produced. Nor can the drawer be prejudiced by their non-production; for if he pays the bill without notice of any superior adverse claim, under the negotiation of another of the set to a third person, he will be discharged from liability.

See also, *Caras v. Thalmann*, 138 App. Div. 297.

§ 311. Rights of holders where different parts are negotiated. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

§ 312. Liability of holder who indorses two or more parts of a set to different persons. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

§ 313. Acceptance of bills drawn in sets. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

§ 314. Payment by acceptor of bills drawn in sets. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§ 315. Effect of discharging one of a set. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

Variant.—The Wisconsin statute adds two new sections, entitled “Damages on Bills,” as follows:

“Sec. 1682. Whenever any bill of exchange drawn or indorsed within this state and payable without the limits of the United States, shall be duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same as the current rate of exchange at the time of the demand and damages at the rate of five per cent. upon the contents thereof, together with interest on the said contents to be computed from the date

of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses."

"Sec. 1683. If any bill of exchange drawn upon any person or corporation out of this state, but within some state or territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment, the drawer or endorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest, according to its tenor and five per cent. damages, together with costs and charges of protest."

Two parts of a bill of exchange drawn in a set in New York on a drawee in Paris were mailed in separate covers to the payees in Spain. Only the second part of the bill was received. This was indorsed by the payees, negotiated and presented to the drawee and payment refused, because the first part, which was apparently regularly indorsed by the payees and several other persons, had been previously presented and paid in good faith. One notice of dishonor was given to the drawer, and the indorsee of the payees sued the drawer. The French Code of Commerce provided that "The party who pays a bill of exchange at its maturity and without opposition is presumably discharged." Held, that as the validity of the payment was governed by the law of the place of performance, and as by the French Code the payment of the first part of the bill was valid, although the endorsements were forged, and the drawer was therefore discharged, a complaint which set forth the above facts was demurrable.

Caras v. Thalmann, 138 App. Div. (N. Y.) 297.

Where the plaintiff in the City of New York purchased a draft in a set of two, drawn on a bank in Vienna, and the first of the set, which has been mailed to the payee, was paid by the drawee in good faith on a forged indorsement, the obligation on the duplicate draft was discharged, and the purchaser cannot recover of the drawer.

Casper v. Kuhne, 159 App. Div. (N. Y.) 389; *Kessler v. Armstrong Co.*, 158 Fed. Rep. 745; *Sexton v. Armstrong*, 207 U. S. 597.

ARTICLE 18**Promissory Notes and Checks**

Section 320. Promissory note defined.

321. Check defined.

322. Within what time a check must be presented.

323. Certification of check; effect of.

324. Effect where holder of check procures it to be certified.

325. When check operates as an assignment.

326. Recovery of forged check.

§ 320. Promissory note defined. A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

All bills, notes or other instruments which shall be issued by any bank or individual banker purporting to be receivable in payment of debts to it, shall be deemed and taken to be promissory notes for the payment on demand of the sum or value expressed in such instrument, and such sum shall be recoverable by the holder or bearer of such instrument, in like manner as if the same were a promissory note.

Section 111, New York State Banking Law.

A note may be made payable to "A or bearer," "A or order," or to "A" only.

President v. Hurtin, 9 Johns 217; Kimball v. Huntington, 10 Wend. 675.

But if payable to "A" only, it is not negotiable, not being payable to bearer or to order.

Owens v. Blackburn, 161 App. Div. (N. Y.) 827.

Neither the acknowledgement of value received or negotiable words are essential to bring it within the statute.

Carver v. Hayes, 47 Me. 257; *Franklin v. Marsh*, 6 N. H. 364; *Hickok v. Bunting*, 92 App. Div. (N. Y.) 167; *Hegeman v. Moon*, 131 N. Y. 462.

A promissory note must contain the positive engagement of the maker to pay a fixed sum at a certain definite time and the agreement must not depend on any contingency, but be absolute and at all events.

Carnwright v. Gray, 127 N. Y. 99; *Merchants National Bank v. Sugar Co.*, 162 App. Div. 248.

An instrument by which the person signing it promises unconditionally to pay another certain sum of money at a certain specified time, is negotiable, although coupled with an acknowledgement of the receipt of a policy of insurance.

Equitable Trust Co. v. Newman, 69 Misc. 494; *Equitable Trust Co. v. Taylor*, 146 App. Div. 424.

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.

Hibernia Bank v. Dresser, 132 La. 532.

A complaint in an action on a promissory note payable to the order of the maker, which does not allege his indorsement of it, is demurrable.

Edelman v. Rams, 58 Misc. 561; *Odell v. Clyde*, 23 Misc. 734; *Simon v. Mintz*, 51 Misc. 671.

An allegation in a complaint in an action on a note that the instrument was delivered for a "valuable consideration" is a statement of fact and not a conclusion of law, and the complaint is not demurrable for failure to state facts constituting a cause of action.

St. Lawrence Bank v. Watkins, 153 App. Div. (N. Y.) 551.

A person who places his name on the back of a promissory note made by the maker, to the order of himself, before indorsement by the maker, cannot escape liability as an indorser under this section.

Yonkers National Bank v. Mitchell, 156 App. Div. 318.

In an action on a note payable absolutely, evidence is not admissible to prove an oral agreement that the maker of the note was not to pay it unless he received the amount of the note from another person.

Torpey v. Tebo, 184 Mass. 307; *Tacoma Mill v. Sherwood*, 39 Pac. 977; *Woods v. Finley*, 153 N. C. 498;

Nor is parol evidence admissible to show that it was agreed that the maker should pay in small amounts.

Cauley v. Dunn, 167 N. C. 32.

Where a note is ambiguous on its face, extraneous evidence, either written or oral, is admissible, to explain it.

Dunbar Box Co. v. Martin, 53 Misc. 312.

Promissory Note.

\$ 600.00	Chicago, Ill. May 23 1917
Three months after date I promise to pay to the order of Edward Osborne.	
Six hundred no/100	Dollars
at Green Exchange Bank Chicago, Ill.	
Value received with us	
For	Franklin Mailey

A promissory note differs from a mere acknowledgement of debt without any promise to pay, as when the debtor gives his creditor an I O U. In its form it usually contains a promise to pay, at a time therein expressed, a sum of money to a person therein named, or to his order, for value received. It is dated and signed by the maker.

A note by two or more makers may be either joint or joint and several. A note signed by more than one person, and beginning, "We promise," etc., is a joint note only. A joint and several note usually expresses that the makers jointly and severally promise. But a note signed by more than one person, and beginning, "I promise," etc., is several as well as joint. So, a note beginning, "I promise," and signed by one partner for his co-partners, is a joint note of all. A note in the form "I promise," etc., subscribed by two persons, is a joint and several note. Persons who sign their names to a note will be presumed to be joint makers in the absence of anything to the contrary on the face of the note.

Although a promissory note, in its original shape, bears no resemblance to a bill of exchange, yet when indorsed it is exactly similar to one; for then it is an order by the indorser of the note upon the maker to pay the indorsee. The indorser is, as it were, the drawer; the maker, the acceptor; and the indorsee, the payee. Most of the rules applicable to bills of exchange equally affect promissory notes.

There are two principal qualities essential to the validity of a note:

1. That it be payable at all events, and not dependent on any contingency.
2. It is required that it be for the payment of money only.

The original parties to a promissory note are the maker or drawer and payee. The essential parts to a note are: *Date*, which is usually that of its delivery, but may be date ahead or back of delivery. Where no date is mentioned it will be presumed to be that of its delivery. *Time*, the time of payment may be expressed in days, months, years, demand or some other fixed determinable time; where no time is stated it is payable

on demand. *Promise*, which must be absolute and not conditional or contingent. *Payee*, the person, firm or corporation to whom the promise is made, which payee must be expressed with certainty and be capable of being identified. *Amount*, which must be stated with certainty and be in money, not securities or property. *Place*, which may be anywhere designated by the maker. If payable at a designated bank without the address indicated, it will be presumed to be payable at that bank in the city or town where the note was executed. Where no place of payment is stated it is payable at the place of business or residence of the maker. *Value received*, or similar words are not necessary, the law assuming it being issued for value. *Interest*, where not specified does not bear interest until after maturity. *Signature*, which is that of the maker or his or its authorized agent.

A promissory note bearing date of a secular day, but in fact made and delivered on Sunday, is invalid as between the parties.

Cook v. Forker, 193 Pa. 461; Crawson v. Gross, 107 Mass. 439; Froemert v. Decker, 51 Wis. 46; Meader v. White, 66 Me. 90; 22 Am. Rep. 551; Textbook Co. v. Ohl, 150 Mich. 131; 13 L. R. A. 1157; Parker v. Pitts, 73 Ind. 597; 38 Am. Rep. 155; Braford v. Chandler, 81 Vt. 270; 17 L. R. A. 1239; Green v. Tulane, 52 N. J. L. 169; 28 Atl. 9.

The following clauses may be added:

- (1) "With interest at the rate ofper cent. per annum until paid."
- (2) "With interest at the rate ofper cent. per annum, payablein advance."
- (3) "Should the interest not be paid as agreed, then the whole sum of principal and interest shall immediately become due and payable, and interest shall be compounded monthly thereafter at the rate ofper cent. per annum."
- (4) "Said interest, if not paid as it becomes due, is to be added to the principal, and become part thereof, and to bear interest at the same rate."
- (5) "Withper cent. attorney's fees in case the holder is obliged to place this note in the hands of an attorney at law for collection."
- (6) "Waiving grace."
- (7) "Waiving grace and protest."
- (8) "Waiving all benefit of stay and exemption laws."
- (9) "The maker and endorser of this note hereby expressly waive all right to claim exemption allowed by the constitution and laws of this or any other state."
- (10) "The maker, signer and endorser of this note severally waive demand, notice and protest, and agree to all extensions and partial payments, before or after maturity, without prejudice to the holder."

(11) "No extension of the time of payment with or without our knowledge, by receipt of interest or otherwise, shall release us or either of us, from the obligations of payment."

(12) (In Louisiana) "The endorsers and sureties waiving the pleas of discussion and division."

(13) (In states where the ability of married women to contract is limited) "I sign this note intending hereby to charge my separate estate with the payment of same."

PROMISSORY NOTE WITH DEPOSIT OF COLLATERAL.

(Long Form)

§..... 191.....

..... after date, for Value Received

..... PROMISE to pay to the order of THE BANK OF

at its banking house in the City of DOLLARS,

with interest at the rate of per cent. per annum (1) having deposited with and pledged to said Bank, as collateral security for the payment of this note and also for all other present or future liabilities and demands of any kind of the holder hereof, against the undersigned, now existing or hereafter contracted, whether created directly or acquired by assignment, whether absolute or contingent, whether due or to become due, upon the stipulations and powers herein contained, the following property, viz.:

.....

the market value of which is now \$..... The undersigned hereby give the Bank a lien for all of said liabilities and demands, including this note, upon all property of the undersigned, left in the possession or custody of said Bank for safe keeping or other purpose, or coming to said Bank in any way (all remittances and property to be deemed in its possession or custody as soon as put in transit to said Bank by mail or carrier), and upon any money or moneys and balance of deposit or deposits with said Bank, hereby authorizing and empowering said Bank at any time to apply said moneys and the deposit account or accounts of the undersigned on the books of the said Bank, in whole or in part, to the payment of any or all of said demands; and do hereby authorize and empower said Bank, upon or after the non-payment of this note, or of any of said other liabilities and demands when due, or in case of failure to comply with any demands hereunder, or to furnish further security or make payment on account as hereinafter agreed, to sell, assign, transfer and deliver the whole or any part of said collateral security or any substitutes therefor or additions thereto, or other property upon which said Bank is hereby given a lien, at any Broker's Board or at public or private sale at the option of said Bank, or any of its officers, or agents, without advertisement, or notice of intention to sell, or of the time or place of sale, and without demand of payment of this note or of any of said other liabilities and demands (such advertisement, notice and demand being hereby expressly waived), and after deducting all costs and expenses, including counsel fees, arising from or incidental to the sale, realization or collection of any of said collateral security, substitutions or additions or of any of said liabilities and demands, including this note, to apply the residue of the proceeds to pay any or all of said liabilities and demands in whole or in part, due or not due, including this note, making a rebate of interest upon demands not matured by their terms, returning the surplus, if any, to the undersigned; and do hereby agree that at any such sale the said Bank may become the purchaser of any or all of said collateral security, substitutions, additions or other property upon which said Bank is hereby given a lien, and may hold the same thereafter in its own right absolutely, free from any claim and any right of redemption of the undersigned; and that in case of deficiency the undersigned will pay to the said Bank the amount thereof forthwith; and do hereby agree that if said Bank, or any of its officers or agents, shall at any time be of opinion that said property is of less value than above stated, or that the whole or any part of the property above or hereafter specifically pledged or on which the said Bank is hereby given a lien, has declined or may decline in value, so that the market value shall not be at least..... per cent. more than the amount unpaid of this note and all other liabilities of the undersigned to said Bank, or if the same shall, at any time, for any other reason become unsatisfactory to said Bank, then said Bank may in its discretion, call for payment on account or additional security satisfactory to the holder of said note, and the undersigned will immediately make such payment on account, or furnish such additional security, and that in case of failure so to do before twelve o'clock noon of the next day after the day of such call, this note and all other liabilities of the undersigned to the said Bank, without notice or demand, shall at the option of said Bank, be and become forthwith due and payable, and said Bank may immediately reimburse itself by a sale of said securities as hereinbefore provided. Such call for payment or additional security may be made by giving any of the undersigned oral or written notice thereof, or by leaving written notice thereof at any office or place of business or usual abode of any of the undersigned. In case of any exchange of, or substitutions for, or addition to said property, or any part thereof, the provisions of this agreement shall extend to such new, exchanged, substituted or additional property; and do hereby agree that said Bank may transfer this note and that upon such transfer said Bank may deliver all security held therefor, or any part thereof, to the transferee who shall thereupon become vested with all the powers and rights herein given to said Bank in respect thereto, and the said Bank shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter.

It is further agreed that if the undersigned shall become insolvent, or make a general assignment for the benefit of creditors, or if a petition in bankruptcy shall be filed by or against the undersigned, or a receiver shall be appointed of his property or assets, then this note and all other liabilities of the undersigned to said Bank shall thereupon become due and payable forthwith. The undersigned hereby expressly empowers said Bank, at its option, to subscribe for, take and hold, as additional collateral for any and all of the indebtedness above named, all stock increases and stock and other special dividends which may be made upon collaterals held hereunder.

It is further agreed that no delay on the part of the holder hereof, in exercising any rights hereunder, shall operate as a waiver of said rights.

PROMISSORY NOTE WITH DEPOSIT OF COLLATERAL
(Short Form)

.....19....
\$.....
.....after date for Value Received,
.....promise to pay to The.....
Bank of....., or order, at its office.....
..... Dollars,
in United States gold coin, or its equivalent, with interest from date hereof;
having deposited with it as collateral security for payment of this or any other
liability or liabilities of ours to it, due or to become due, or that may be here-
after contracted, the following property, viz.:
.....
.....
the market value of which is now, with this condition,
viz., that the Bank of has the right to call
for additional security should the said collateral decline in value, and on
failure to respond to such call, or on the non-performance of this promise,
or on the non-payment of the liabilities above mentioned, the said Bank, its
President or Cashier, is hereby given full power and authority to sell and
assign and deliver the whole or any part of the above-named securities, or any
substitute therefor, or any addition thereto at any Brokers' Board, or at any
public or private sale, at the option of the said Bank of.....
or its President or Cashier, or their assigns, at any time or times hereafter,
without advertisement or notice—such advertisement or notice being hereby
expressly waived; and upon such sale the said Bank of
....., the holder hereof may purchase the whole or any part
of such securities—discharged from any right of redemption, and after deducting
all legal or other costs and expenses for collection, sale and delivery, may
apply the residue of the proceeds of such sale or sales to pay any, either, or fall
of said liabilities as said Bank of shall
deem proper, returning the overplus to the undersigned. And the under-
signed agrees to be and remain liable to the holder hereof for any deficiency.

GUARANTY OF COLLATERAL NOTE.

IN CONSIDERATION of One Dollar (\$1.00) and other valuable consideration paid to the undersigned, the receipt of which is hereby acknowledged, and of the making, at the request of the undersigned, of the loan evidenced by the within note and contract, the undersigned hereby jointly and severally guarantee to the Bank of, its successors, endorsees or assigns, the punctual payment, at maturity, of the said note and contract and of the said loan, and hereby assent to all the terms and conditions of the said note and contract, especially agreeing that so long as the maker is bound by the said note and contract and the conditions therein contained, that he will remain bound,—waiving any defenses that the maker or makers could not maintain as maker.

The undersigned hereby waives demand of payment, and also waives the protest, and notice of protest of the within note.

.....

NOTE WITH TRANSFER OF ACCOUNT

\$..... (Place) Date

On demand after date we promise to pay to the order of

THE BANK

of

..... DOLLARS
at the office of the BANK of, value
received with interest.

.....

Per.....

To secure the payment of this note and for value received we hereby sell, transfer and assign to the Bank, our right, title and interest in the account mentioned herein, viz: (a mechanics' lien for \$2,000 against property of Richard Roe, situate at No. 7 Broad Street) and we hereby constitute ourselves as the Agents for the said Bank, for the purpose of collecting this account, and agree to turn over to the said Bank of, the proceeds of said account as soon as collected.

.....

In the foregoing note the interest of the maker in the mechanics' lien is assigned to the bank, while by its terms the maker may collect the amount thereof, but in doing so, he is acting as agent for the bank. Should he collect the amount and appropriate to his own use, an action for larceny would lie.

**FORM FOR ASSIGNMENT OF BOOK ACCOUNTS AS COLLATERAL
SECURITY**

FOR VALUE RECEIVED, I hereby sell, assign and transfer to the First National Bank each and every of the accounts, claims, demands and causes of action named in the schedule hereto annexed, said schedule designating the debtor's name, date of accounts and amount of same.

I state and represent that said accounts are valid and subsisting and except as may be specified in said schedule, there are no set-offs of counter claims thereto. I further agree that in case any of said debtors remit for or pay upon said accounts to me, that I will receive the said payment or remittance as agent for said bank.

This assignment is made as collateral security for all my present indebtedness to said bank and for all future claims or demands or indebtedness which it may have or hold against me.

JOHN SMITH

Dated191....

On before me personally appeared **JOHN SMITH** to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

.....Notary Public.

Sale of Collateral secured by note.

\$ 1100.00	Brooklyn N.Y. July 16 th 1900
Three months	after date
I promise to pay to the order of Charles Bauer	
Eleven hundred	Dollars
at First Nat Bank	
Value received with me	
Per _____	Chas. Toplitz

Accompanying this note was an agreement in writing providing that in case of non-payment of the note when due, Bauer could upon five days notice surrender a life insurance policy left with him by Toplitz. Upon maturity of the note Bauer did not exact strict performance, but without consideration extended the time of payment. Later without notice to

the maker Bauer surrendered the policy to the insurance company and applied the proceeds to the payment of the note. This company refused to renew the policy and the maker shortly thereafter died. In an action for the difference between the note and the \$5,000 policy, the court held, that Bauer waived the right to surrender the policy without notice when he said he would "hold it a few days." While he could have sold at maturity, but by extending time he would have to give timely notice. To quote from the decision:

"In recent times the right of the parties to enter into a contract providing for a sale or disposition, without notice, has been recognized, and the disability of the pledgee to become the purchaser, it is said, may be removed by express stipulation of the parties. The pledgee doubtless has the right to exact strict performance of the contract according to its terms, and, upon default in the payment of the debt at the time stipulated, he may, under a contract like this, dispose of the pledge. But if he waives the right to exact strict performance, and gives time and indulgence to the debtor, he cannot recall this waiver at his own option without notice to the pledgor, to the end that the latter may have an opportunity of protecting the pledge. The good faith which the law exacts from a person dealing with trust property will not permit the pledgee, after having once waived the forfeiture or the right to dispose of the pledge upon default of payment at the prescribed time, to suddenly stop short and insist upon the forfeiture for the non-payment of the debt when the other party is unprepared to redeem. Strict performance in such cases may be waived by any agreement, declaration or course of conduct on the part of the pledgee which leads the owner to believe that a forfeiture will not be insisted upon without an opportunity given him to redeem."

Toplitz v. Bauer, 161 N. Y. 325; Insurance Co. v. Eggleston, 96 U. S. 577.

CERTIFICATES OF DEPOSIT

The National Bank of Commerce of Rochester. N^o 2478

Rochester, N.Y. Aug 10, 1917 \$ 1000.00

John Doe has deposited in this Bank

One Thousand Dollars

payable to the order of Thomas J. Johnson

and return of this Certificate properly indorsed.

Richard Roe

NOT SUBJECT TO CHECK Cashier

When a person wishes to place funds in a bank upon which he does not expect to draw checks, he may secure a certificate of deposit from the bank. Certificates of deposit are the bank's receipts for funds deposited. They are negotiable and are often passed in settlement of debts. They are not subject to check. A certificate of deposit is payable on demand upon return of the certificate properly indorsed. If the money is to remain in the bank for ninety days or more it usually draws interest, but such arrangements must be made at the time of the deposit. Certificates for deposit made for a definite period of time are known as time certificates of deposit.

A certificate of deposit contains the elements of a promissory note. It is a written acknowledgement by a bank of the receipt of a sum of money on deposit, which the bank promises to pay to the depositor or his order, or to some other person whereby the relation of debtor and creditor between the bank and the depositor is created. The words "promise to pay" are not essential because the law implies such a promise when the fact of deposit is established. While money for which a certificate of deposit is given by a bank is, in legal effect, in the nature of a loan, yet it is not a loan in the ordinary sense of the term, but a real deposit. No particular form is necessary to constitute a certificate of deposit. A letter of advice written by the cashier of one bank to another bank, stating that a person therein named has deposited with the former bank a sum of money therein stated, to the credit of the latter bank for the use of another, has been held to be a certificate of deposit. An ordinary deposit slip, however, signed by the cashier of the bank in which the deposit is made is not a certificate of deposit.

3 R. C. L. 198; *Leaphart v. Bank of Columbia*, 33 L. R. A. 700; *Armstrong v. American Exch. Bank of Chicago*, 133 U. S. 433; *First National Bank v. Clark*, 134 N. Y. 368; *State v. Jackson*, 120 S. W. (Mo.) 478; *Elliott v. Capital City Bank*, 103 N. W. (Ia.) 275; *Reed v. Marine Bank*, 136 N. Y. 454; *Zander v. N. Y. Security and Trust Co.*, 178 N. Y. 208.

§ 321. Check defined. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check.

Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance no action can be maintained by the holder upon either

against the drawee. The chief difference is that a check is always drawn on a bank or banker. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded and the statute of limitations runs only from that time.

Merchants Bank v. State Bank, 10 Wall. 604; *Bull v. Bank of Kasson*, 123 U. S. 110.

A check is a mere order on a bank to pay from the depositor's account according to the instructions therein contained, and may be revoked by the drawer at any time before payment or certification.

Mitchell v. Security Bank, 85 Misc. 360.

It is a commercial device intended to be used as a temporary expedient for actual money, and is generally designed for immediate payment and not for circulation.

Kennedy v. Jones, 78 S. E. (Ga.) 1069.

Check.

30-189

CITIZENS BANK

ROCHESTER, N. Y. July 1, 1917

PAY TO THE ORDER OF Charles E. Wilson \$ 346.00

Three hundred forty six and no/100 DOLLARS

No. _____ Geo. W. Cooper

The original parties to a check are drawer or maker, George W. Cooper; drawee, Citizens Bank; payee, Charles E. Wilson. The drawer.—By signing his name the drawer says in effect, I have or will have on the date of the check on account with the Citizens Bank sufficient to pay the amount thereof upon demand. The drawee of a check is always a bank or banker. The drawee.—The bank promises in advance to pay it on presentation, properly indorsed it if has sufficient funds of the drawer. The bank is not required to make a partial payment. The payee assumes no financial obligations, but frequently does assume some obligations when he sells or transfers it, by indorsement. The death of the drawer of a check revokes the right of the drawee to pay the amount. The drawer may at any time before presentment by notifying and sufficiently describing the instrument stop payment.

The essential parts of a check are, *Date*, which is usually that of its issuance, but may be dated back or ahead, but is not payable until on or after its date; *Drawee*, which must be a bank or banker; *Payee*, which may consist of one or more persons or corporations, or may be payable to bearer; *Amount*, which must be fixed with certainty, and in the United States expressed in dollars and cents—and not qualified by the use of words, “in current funds,” “in currency” or similar phrases. In case of variance between the amount in writing and the figures the writing governs, the custom of inserting the figures are merely for convenience. *Signature* of drawer or maker, which must conform to arrangements with the bank.

The chief differences between checks and bills of exchange are: 1st. A check is not due until presented, and, consequently, it can be negotiated at any time before presentment, and yet not subject the holder to any of the equities existing between the previous parties. 2d. The drawer of a check is not discharged for want of immediate presentment with due diligence, while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only *pro tanto*. 3d. The death of the drawer of a check rescinds the authority of the banker to pay it; while the death of the drawer of a bill of exchange does not alter the relations of the parties. A bank check is substantially the same as an inland bill of exchange; it passes by delivery when payable to bearer, and the rule as to presentment, diligence of the holder, etc., which are applicable to one are generally applicable to the other.

Checks are in use only between banks and bankers and their customers, and are designed to facilitate banking operations. It is of their very essence to be payable on demand, because the contract between the banker and customer is that the money is payable on demand. A check on a banker is, in legal effect, an inland bill of exchange, drawn on a banker, payable to bearer, on demand, and subject, in general, to the rules which regulate the rights and liabilities of parties to bills of exchange.

Cashier's Check.—A cashier's check, so-called, differs radically from an ordinary check. The latter * * * is an order upon a bank purporting to be drawn upon a deposit of funds, for the payment of a certain sum of money to a person named, or to order or bearer, on demand. As between himself and the bank, the drawer of the check has the power of countermanding his order of payment at any time before the bank has paid it, or committed itself to pay it. When the check, however, is certified by the bank, the power of revocation by the drawer ceases, and the bank becomes the debtor. A cashier's check is of an entirely different

nature. It is a bill of exchange, drawn by the bank upon itself, and is accepted by the act of issuance; and, of course, the right of countermand, as applied to ordinary checks, does not exist as to it.

Effect of memorandum on check.

HOUSTON, TEXAS Dec 30 1916 NO. _____

THE HOUSTON NATIONAL EXCHANGE BANK 35-3

PAY TO THE ORDER OF Dr. J. C. Fuller \$ 400

Four hundred no/100 DOLLARS

In full satisfaction
of all claims to date Edmund Kamp

The bank on which this check is drawn is in no manner concerned in the written memorandum, "In full satisfaction of all claims to date." It is however important to the payee, and unless he is satisfied to accept the amount in full satisfaction he should return it to the debtor. The payee would not relieve himself from liability by striking out the memorandum without authority. In the case here illustrated Dr. Fuller sent the maker a bill for \$670 for services. The maker disputed the amount and mailed a check for \$400, as above. Fuller retained and collected the check, and again sent a bill for the full amount, crediting the sum of \$400, represented by the check. The maker thereupon wrote Fuller that he did not recognize Fuller's right to retain the check and repudiate the conditions, and requesting him to return the money or retain it on the condition named. In an action for the balance of the bill held, that there was in law an accord and satisfaction and no recovery thereon could be sustained; that upon receipt of the letter, Fuller had the alternative, the prompt return of the money or the extinguishment of the debt. This rule would not apply where the amount of the account was liquidated.

Fuller v. Kamp, 138 N. Y. 231; Tonslee v. Healey, 39 Vt. 522; Baird v. U. S., 96 U. S. 430; Jaffray v. Davis, 124 N. Y. 164; Bull v. Bull, 43 Conn. 455; Hilliard v. Noyes, 58 N. H. 312; Brick v. Plymouth, 63 Iowa, 462; Hinkle v. Minneapolis R. R. Co., 31 Minn. 434; Eams v. Prosser, 157 N. Y. 290.

A bill of exchange drawn on a bank, if payable on demand, is a check, and such a bill is payable on demand unless a specific date of payment is mentioned.

Riddle v. Bank of Montreal, 145 App. Div. (N. Y.) 207.

The distinction between a bill and a check is that the former is not payable on demand, while the latter is. It does not depend upon the question whether drawn on a bank or banker.

Bowen v. Newell, 8 N. Y. 190; Harrison v. National Bank, 41 Minn. 488; 43 N. W. 336.

Payment by check.—The giving of a check to a creditor is not in itself a satisfaction of the debt unless the check is paid.

Burkhalter v. Second National Bank, 42 N. Y. 538; Cooney v. U. S. Wringer Co., 101 Ill. 468; Sutton v. Baldwin, 146 Ind. 341; People's Bank v. Gifford, 108 Iowa 277; Union Biscuit Co. v. Grocery Co., 143 Mo. App. 300; Bradford v. Fox, 38 N. Y. 289.

See also, Harris v. Clark, 3 N. Y. 93.

§ 322. Within what time a check must be presented. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Variant.—The Illinois statute adds "and notice of dishonor as provided for in case of bills of exchange" after the word "issue."

This section applies only to the rights of the drawer; as to the indorser see notes Section 131.

In order to hold the drawer it is necessary that the holder make presentment.

Dolph v. Rice, 18 Wis. 397; Herker v. Anderson, 21 Wend. 372.

While as between the holder and drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss has resulted to him, a different rule obtains as between the holder and indorser.

Carroll v. Sweet, 128 N. Y. 19; Bull v. Bank, 123 U. S. 105.

The transfer of a check to successive holders does not extend the time for presentment. If not presented in a reasonable time the drawer is discharged to the extent of the loss sustained by reason of the failure to present.

Gordon v. Levin, 194 Mass. 418; Gregg v. Beane, 37 Atl. (Vt.) 248; Dehoust v. Lewis, 128 App. Div. (N. Y.) 131; Veazie Bank v. Winn, 40 Me. 60; First National Bank v. Mackey, 157 Ill. App. 408.

In order to charge a payee indorser, the bank must present the check to the drawer bank without delay. The paying bank will not be considered as agent of the payee and must suffer from the acts of its own negligence.

Albi v. Evansville Bank, 124 Wis. 73; 102 N. W. 329; 68 L. R. A. 964.

Reasonable time.—See Section 4. Reasonable time is not fixed by the statute, but by consensus of authority, in the absence of special circumstances of excuse, is limited to the next business day, or, if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment.

Gifford v. Hardell, 60 N. W. (Wis.) 1064; *Albi v. Bank*, 124 Wis. 73; *Industrial Saving Co. v. Weakley*, 103 Ala. 458; *Brown v. Johnson*, 12 N. C. 293.

Where a check is sent by mail and received by the payee the day after it is drawn, the reasonable time for presentation to the drawee is extended only until the expiry of the day following its receipt.

Dehoust v. Lewis, 128 App. Div. 131; *Carroll v. Smith*, 128 N. Y. 19, 22.

In *Furber v. Dane*, 203 Mass. 108 (89 N. E. 227), the court held, that a delay of two days by the holder in the presentment discharged the drawer, and the right of the holder was no greater than the general creditors.

For the same rule see, *Babcock v. City*, 137 Pac. Rep. 899; *National Bank v. Weil*, 141 Pa. St. 457; *Brown v. Schnitz*, 202 Ill. 509; *Cox v. Citizens Bank*, 85 Pac. (Kans.) 762; *Hamilton v. Salt Co.*, 54 N. W. (Mich.) 903; *Bank v. Carroll*, 116 N. W. (Neb.) 276.

Ordinarily between drawer and drawee, where a check is payable in the same town in which it is given, it should be presented the day of its receipt or the next day.

Dehoust v. Lewis, 128 App. Div. (N. Y.) 131; *Smith v. Miller*, 43 N. Y. 171; *S. B. & N. Y. R. R. v. Collins*, 57 N. Y. 641; *Loux v. Fox*, 171 Pa. St. 68.

Allowance must be given for the presentment of a check mailed to another location. In general it is required that the person receiving such check, in the absence of special circumstances, forward it for presentment not later than the day of its receipt, and the agent to whom it is thus forwarded present it for payment not later than the day it is received by him.

Brady on Law of Bank Checks, 100; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396; *N. M. Coal Co. v. Bowman*, 28 N. W. (Ia.) 150; *Lloyd v. Osborne*, 65 N. W. (Wis.) 859; *Buckhannon v. National Bank*, 31 Atl. (Md.) 302;

Haggerty v. Baldwin, 131 Mich. 187; Carroll v. Sweet, 9 Misc. 382; Gifford v. Hardell, 88 Wis. 528; Plover Savings Bank v. Moody, 110 N. W. (Ia.) 29; Deboust v. Lewis, 128 App. Div. (N. Y.) 131; Williams v. Brown, 53 App. Div. (N. Y.) 486; Sulzberger & Sons Co. v. Cramer, 170 App. Div. 114.

Failure to present a check within a reasonable time does not exonerate the drawer unless there has been a loss.

Baldwin's Bank v. Smith, 215 N. Y. 76; Watt v. Gans, 114 Ala. 264; Simpson v. Pacific Ins. Co., 44 Cal. 139; N. W. Coal Co. v. Bowman, 69 Iowa 150; Grange v. Reigh, 93 Wis. 552; Woodruff v. Plant, 41 Conn. 344; Stevens v. Park, 73 Ill. 387.

Payment through clearing house.—Some courts hold that presentation of a check through the clearing house does not add to the period within which presentment is required. (Holmes v. Roe, 28 N. W. (Mich.) 864; Rosenblatt v. Haberman, 8 Mo. App. 486.) The rule, however, followed by most of the states in this regard is announced by the courts of New York and Pennsylvania which hold that, where a check is delivered after banking hours, the holder is not bound to present it for payment on the following day, but may deposit it in his bank on such day, and a presentment by such bank through the clearing house on the second day after delivery is sufficient.

Brady on Checks, 104; Zaloon v. Garvin, 72 Misc. 36; Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191; Hentz v. National City Bank, 159 App. Div. 743; Willis v. Finley, 173 Pa. St. 28.

Presentment after death of drawer.—Where a bank has paid a check drawn by a depositor, but without knowledge of his death and in due course of business, the administrator of such depositor cannot recover from the bank the amount so paid, although the check was not presented to or paid by the bank until after the death of the depositor.

Glennan v. Rochester T. and S. D. Co., 209 N. Y. 12; 2 Dan. Neg. Inst. 569; 52 L. R. A. 302; Matter of Stacey, 89 Misc. 88; Long v. Thayer, 150 U. S. 520.

Where the payee of a check collects it after the death of the drawer, the estate may maintain an action against the payee to recover the amount.

In re Adamson, 154 N. Y. Supp. 667; Bainbridge v. Hoes, 163 App. Div. (N. Y.) 870; Matter of Stacy, 152 N. Y. Supp. 717.

Where a savings bank account was opened in the names of a husband and wife, and there was no evidence as to the ownership at the time of the deposit, or as to any agreement that it was to be jointly or otherwise owned, it was held that upon the death of the husband, the wife was entitled to the entire deposit.

In re Missionary Society, 160 N. Y. Supp. and cases cited.

The death of the maker of a check delivered to the payee three days before his death revokes the payee's authority to draw the money, and although the check having been deposited in the payee's bank on which it was drawn two days after the maker's death, the fund constitutes a part of the maker's estate.

Matter of Mead, 90 Misc. 263.

§ 323. Certification of check; effect of. Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

In certifying a check the bank virtually says that the check is good, we have the money of the drawer here ready to pay it. We will pay it now if you will receive it. The holder says no, I will not take the money; you may certify the check and retain the money for me until the check is presented.

National Bank of Jersey City v. Leach, 52 N. Y. 350; Carnegie Trust Co. v. First National Bank, 213 N. Y. 307; Times Square Auto Co. v. Rutherford Bank, 77 N. J. 649.

A bank certifying a check does not warrant the genuineness of the title of the payee or holder, and in this case the payee and holder has no title to the check, and cannot enforce it.

M. National Bank v. National C. Bank, 59 N. Y. 67; Cont. National Bank v. Tradesmen's Bank, 173 N. Y. 272.

Where a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check, as the money is no longer his.

Schlessinger v. Kurzrok, 47 Misc. 637; First National Bank v. Leach, 52 N. Y. 350.

A bank which has certified the check of a depositor payable to his own order becomes as acceptor primarily liable thereon to any bona fide holder thereof.

Poess v. Twelfth Ward Bank, 43 Misc. 45.

A bank upon certification of a check becomes the primary debtor, and cannot thereafter refuse to pay it in order to make a set-off available to its depositor.

Carnegie Trust Co. v. First National Bank, 213 N. Y. 301; reversing 156 App. Div. 712.

The certification of checks is well known to be one of the greatest dangers to the integrity of their funds with which banks have to contend. The power to certify checks, unless guarded and restrained, is nothing less than the power of a corrupt letter, or other servant to give away the

funds of the bank. Such abuses have been produced by the exercise of this power that prudent banks, as is well known, have generally discontinued the practice of certifying checks, and have substituted therefor the practice of taking up the check tendered for certification and issuing in its place their own cashier's check, which is tantamount to their own promissory note.

Bank of Springfield v. First National Bank, 30 Mo. App. 271.

Certification of post-dated check.—"Where a post-dated check is certified by the cashier of the bank on which it is drawn to be 'good,' by indorsement thereon, before the day of its date, the instrument, upon its very face, communicates facts and information to persons receiving the same that the cashier, in making such certification, was not acting within the known limits of his power, and that he was clearly exceeding them."

Clarke National Bank v. Bank of Albion, 52 Barb. (N. Y.) 592.

This case is cited with approval in 1 *Morse, Banks and Banking* (4th ed.), Sec. 413, and the author says:

"When a post-dated check is certified before maturity, it carries notice to all that the certification was beyond the officer's authority."

Certification of a raised check.—A bank which certifies a raised check and afterwards pays it is entitled to recover the amount from the bank to which it was paid. The certification warrants the genuineness of the drawer's signature and that he has funds on deposit, which will be held for the payment of the check, but does not warrant the genuineness of the body of the check. It is no defense for the collecting bank to say that the drawee bank was negligent in failing to detect the alteration, for the opportunity of discovering the alteration was equally open to the collecting bank.

National Reserve Bank v. Corn Exchange Bank, 157 N. Y. Supp. 316; 171 App. Div. 195; *Udam v. Manufacturers' National Bank*, 116 Supp. 595; *Merchants Bank v. Baird*, 160 Fed. 642; *Continental Bank v. Metropolitan Bank*, 107 Ill. App. 455; *Blake v. Hamilton Sav. Bank*, 79 Ohio St. 189; *Jackson Paper Co. v. Commercial Bank*, 199 Ill. 151; *Continental National Bank v. Tradesmen's National Bank*, 173 N. Y. 272; *Epsy v. National Bank of Cincinnati*, 85 U. S. 604.

Stopping payment of certified check.—It is a general rule that payment of a certified check cannot be stopped as against a holder in due course, and it makes no difference whether the check was certified at the instance of the drawer or of some person to whom it was negotiated.

Meridian National Bank v. First National Bank, 7 Ind. App. 322, 33 N. E. Rep. 237; *Pease & Dwyer v. State National Bank*, 114 Tenn.

693, 88 S. W. Rep. 172; *Poess v. Twelfth Ward Bank*, 43 Misc. Rep. 45, 86 N. Y. Supp. 857.

But if the certification is induced by mistake, and the rights of no third party have intervened, and the holder has lost nothing, nor changed his position in reliance upon the certification, the certifying bank may be relieved from liability, and is justified in carrying out the drawer's instructions not to pay the check.

Carnegie Trust Co. v. First National Bank, 141 N. Y. Supp. 745; 213 N. Y. 301; *Cleus v. Bank of New York*, 114 N. Y. 70; *National Commercial Bank v. Miller*, 77 Ala. 168; 54 Am. Rep. 50; *Pease v. Dwyer*, 88 S. W. (Tenn.) 693; *Blake v. Hamilton Sav. Bank*, 79 Ohio St. 189; 88 N. W. 724; *Drinkall v. Bank*, 88 N. W. 724; *Mt. Morris Bank v. Twenty-third Ward Bank*, 172 N. W. 244; *B. and K. Mfg. Co. v. Citizens Trust Co.*, 93 Misc. 94; *Merchants Bank v. First National Bank*, 116 Ark. 1.

Certification by mistake.—If the bank certifies a check to be good by mistake, under the erroneous impression that the drawer had funds on deposit, when in fact he had none, or has been induced by some fraudulent representation to certify it as good, the certification may be revoked and annulled, provided no change of circumstances has occurred which could render it inequitable for such right to be exercised. If the check still remains in the hands of the holder who held it when it was certified, and the mistake is discovered and notified to him so speedily that he has time afforded him to notify and preserve the liability of indorsers, the bank may retract its certificate. But if another person has become the holder of it, or circumstances have so changed that the rights of the holder would be prejudiced, and especially if it has been paid to a bona fide holder without notice, it is absolutely estopped from doing so.

Irving National Bank v. Wetherald, 36 N. Y. 335; *Second National Bank v. Western National Bank*, 51 Md. 133; S. C., 34 Am. Rep. 300; *Rankin v. Colonial Bank*, 31 Misc. 227.

Certification to be in writing.—By Section 220 it becomes necessary that a binding certification be in writing. Where the holder of a check wires the bank asking whether there are sufficient funds to meet it and he receives a reply in the affirmative, it was held that this constituted only an assurance that the check was good at the time of the sending of the telegram and not a certification.

Kahn v. Walton, 46 Ohio St. 197; *National Bank v. Commercial Bank*, 87 Pac. 746; *Myers v. Union Bank*, 27 Ill. App. 254.

But where a bank in response to a telegram as to whether it would pay a check, answered that it would, it was held, to be a certification which bound the bank.

Henrietta Bank v. State Bank, 16 S. W. (Tex.) 321; Atchinson Bank v. Garretson, 51 Fed. 168.

A bank being asked to cash a check on another bank, telephoned to the drawee bank and was informed that the check was "good," and thereupon cashed the check, but before presentment for payment the drawer notified the drawee bank not to pay it. It was held that, for the reason it was not accepted or certified in writing, the drawee bank was not liable.

Van Buskirk v. Bank, 83 Pac. (Colo.) 142.

For cases on the subject generally, see Evansville Bank v. G. A. Bank, 155 U. S. 556; Boon Co. Bank v. Latimer, 67 Fed. Rep. 27; Wallace v. Stone, 107 Mich. 109; Libby v. Hopkins, 104 U. S. 303; Western Tie Co. v. Brown, 196 U. S. 502; Meuer v. Phoenix National Bank, 94 App. Div. (N. Y.) 331; American National Bank v. Miller, 229 U. S. 517; M. M. Bank v. T. T. W. Bank, 172 N. Y. 244; Goshen National Bank v. Bingham, 118 N. Y. 349.

§ 324. Effect where holder of check procures it to be certified. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

The certification of a bank check is not, in all respects, like the making of a certificate of deposit, or the acceptance of a bill of exchange, but that it is a thing *sui generis* and that the effect of it depends upon the person who, in his own behalf, or for his own benefit, induces the bank to certify the check. The weight of authority is that if the drawer in his own behalf, or for his benefit, gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged.

Minot v. Russ, 156 Mass. 458; Cullen v. Union Surety Co., 79 App. Div. (N. Y.) 412.

Certification at instance of drawer.—The certification of a check, if made at the instance of the drawer, does not become effective until the issuance and delivery of the check to the payee, for the implied obligation of the bank is to pay the money deposited to the depositor or to his order.

G. N. Bank v. Bingham, 118 N. Y. 349, 7 L. R. A. 595, 765; Lynch v. First National Bank, etc., 107 N. Y. 179; Thomson v. Bank of British North America, 82 N. Y. 1; Shipman v. Bank of New York, 126 N. Y. 318; 12 L. R. A. 791; Bank of British North America v. Merchants' National

Bank, 91 N. Y. 106; *Citizens' National Bank v. Importers and Traders' Bank*, 119 N. Y. 195; *Kearney v. Met. Trust Co.*, 110 App. Div. 236, 97 N. Y. Supp. 274; *Carnegie Trust Co. v. First National Bank*, 156 App. Div. 712, 141 N. Y. Supp. 745; *Freund v. Importers', etc., Bank*, 76 N. Y. 352; see *Nassau Bank v. Broadway Bank*, 54 Barb. 236; *First National Bank v. Leach*, 52 N. Y. 350; *Worth v. Case*, 42 N. Y. 362.

When a bank at the request of the drawer of a check certifies it before delivery to the payee and it is then delivered, the certification does not discharge the drawer if the check is not paid on due presentment. The certification simply vouches for the genuineness of the check and that it will be paid on presentment, and merely adds to its easy negotiation by adding the promise of the bank.

Born v. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; *Oyster and Fish Co. v. Bank*, 51 Ohio St. 106, 36 N. E. 833; *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; *Blake v. Hamilton Dime Sav. Bk. Co.*, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 691 and 696, 16 Am. Cas. 210.

The certification of a check is charged against the drawer, the remedy of the holder being against the bank, unless the certification is obtained at the instance of the drawer, in which case, if he gets it certified and puts it in circulation, he is still liable in case the bank does not pay.

Minot v. Russ, 156 Mass. 458.

Where the drawer of a check has it certified before delivery, the certification operates merely as an assurance that the check is genuine, and the drawer is not discharged from liability.

Davenport v. Palmer, 152 App. Div. 761; *Minot v. Russ*, 156 Mass. 458; *Born v. First National Bank*, 123 Ind. 78; *Oyster Co. v. Bank*, 51 Ohio St. 106; *Bickford v. Bank of Chicago*, 42 Ill. 238; *Randolph Bank v. Hornblower*, 160 Mass. 401.

If the drawer gets the bank to certify his check and then delivers it to the holder, and the latter neglects to present it to the bank for payment in due course the drawer is discharged to the extent he suffers by the delay.

Heartt v. Rhodes, 66 Ill. 351; *Blair v. Wilson*, 28 Gratt. (69 Va.) 165, 171; *Larsen v. Breene*, 12 Colo. 480, 484, 21 Pac. 498.

Certification at instance of payee.—The effect of a certification of a check at the instance of the payee, or other holder thereof, is to create a new contract between the drawee and the payee, or other holder, for the payment of the amount thereof, and the drawer is thereby released from liability thereon.

Meuer v. Phenix National Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed 183 N. Y. 511; *First National Bank of Jersey City v. Leach*, 52 N. Y. 350; *Freund v. Importers', etc., Bank*, 76 N. Y. 352; see also, *Carnegie Trust Co. v. First National Bank of City of N. Y.*, 156 App. Div. 712, 141 N. Y. Supp. 745.

This rule is logically and necessarily confined to cases in which the check is certified at the instance of the payee, or other holder thereof in due course.

Thomson v. Bank of British North America, supra; *Hartford v. Greenwich Bank*, 157 App. Div. 448; 142 N. Y. Supp. 387; see also, *Morrison v. Chapman*, 155 App. Div. 509, 140 N. Y. Supp. 700.

If the holder receive an uncertified check, and instead of drawing the money has it certified, he discharges the drawer for he has accepted the bank as his sole debtor; the same as if he had drawn the money, then deposited it, and taken a certificate of deposit for it.

Met. National Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; *Born v. Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; *Oyster and Fish Co. v. Bank*, 51 Ohio St. 106, 36 N. E. 833, 128 Am. St. Rep. 691 and 696; *Meuer v. Phoenix National Bank*, 94 App. Div. 331; *First National Bank v. Leach*, 52 N. Y. 350; *Meuer v. Phoenix National Bank*, 183 N. Y. 511.

Where the holder procures certification of a check, the drawer is discharged and the bank becomes the debtor to the holder, and can not avoid payment by showing that the holder obtained the check from the drawer by false pretenses. The certification has the same effect as if the holder had drawn the money, re-deposited it and taken a certificate of deposit for it.

Times Automobile Co. v. Bank, 73 Atl. (N. J.) 479.

Where a bank through the mistake of its teller certifies a check upon which the payment has previously been stopped, and the check has not left the hands of the payee who shows no change of circumstances and no harm or injury to himself, and where the drawer is not discharged by the certification for the reason that he has himself created the situation by stopping payment before the mistaken certification is made, the case is taken out of the rule of liability of a bank upon its certification, and no recovery against the bank, upon suit by such payee, will lie.

B. and K. Mfg. Co. v. Citizens Trust Co., 93 Misc. 94.

For cases on subject generally, see *Lyons v. Union National Bank*, 150 App. Div. 493; *Cooke v. State National Bank*, 52 N. Y. 115; *National Bank of Jersey City v. Leach*, 52 N. Y. 350; *Gallo v. Brooklyn Savings Bank*, 199 N. Y. 222; *Meuer v. Phenix Bank*, 183 N. Y. 511.

§ 325. When check operates as an assignment. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

This is undoubtedly a statement of law, but it is also true that a bank which has received the money of a depositor is bound to honor his checks to the amount of his funds, and is liable in damages to the depositor for not honoring his check, where it has sufficient funds to meet such check; but the duty of the bank to honor the check where there are sufficient funds would, of course, cease upon a countermand of the check or notice of the death of the drawer.

A check is not the assignment of the fund on deposit to the credit of the drawer pro tanto, and the holder is merely the agent of the drawer for the purpose of collecting it, and upon the death of the drawer before presentation the authority of the holder is revoked, and the bank is no longer authorized to pay; but on principles of necessity incident to the banking business, if the bank pays in good faith and without notice of the death of the drawer, it is protected.

Glennan v. Rochester Trust and Safe Deposit Co., 209 N. Y. 12, 102 N. E. 537, 52 L. R. A. (N. S.) 302; *Pease v. State Bank*, 88 S. M. (Tenn.) 172; *Tibley Glass Co. v. F. and M. Bank*, 220 Pa. St. 1; *B. & O. R. Co. v. First National Bank*, 102 Va. 757; *Long v. Taylor*, 150 U. S. 520; *Matter of Stacey*, 89 Misc. 88.

The relation of debtor and creditor, not of agent and principal, exists between a bank and its depositor. The money deposited becomes a part of the bank's general funds and it impliedly contracts to pay its depositor's checks, acceptances and notes payable at the bank to the amount of his credit. In discharging its implied obligation it pays its own money as a principal, not its depositor's money as an agent. It is a mere drawee answerable to the depositor if it fails to fulfill its implied contract obligation to pay notes and checks drawn by the depositor.

Baldwin's Bank v. Smith, 215 N. Y. 76; *Commercial Bank v. Armstrong*, 148 U. S. 50; *First National Bank v. Murfreesboro Bank*, 127 Tenn. 205.

The giving of a check is not the creation of an obligation, but is merely the admission by the drawer of the existence of an obligation to pay a certain sum of money. It imposes no obligation on the drawee to pay the same as between the drawee and payee. It is nothing more than a representation of the drawer that he has money on deposit with the drawee subject to his order, with an implied promise on the part of the drawee

to pay the amount of the check in case it is not paid or accepted by the bank on which it is drawn.

Peninsular Bank v. Penderson Co., 91 Wash. 623.

This section is intended to cover the liability of a bank to the holder of the check, and he can recover from the bank when he brings himself within the provisions of the statute. If a check is neither accepted nor certified, there is no liability on the part of the bank to the holder.

Elyria Saving Bank v. Bin, 111 N. E. (Oh.) 147; *Covert v. Rhodes*, 48 Ohio St. 66; *National Bank v. Berrall*, 70 N. J. L. 757; *Hove v. Bank*, 115 N. W. (Ia.) 476; *19th Ward Bank v. First National Bank*, 184 Mass. 49; *Pollak v. Niall*, 137 Ga. 23; *Moore v. Norman*, 52 Minn. 83; *Smith Co. v. Mitchell*, 117 Ga. 772; *Consolidated Bank v. First National Bank*, 199 N. Y. 516; *Baldwin's Bank v. Smith*, 215 N. Y. 76.

United States Supreme Court cases and those in Illinois and Missouri which follow so hold. The case of *First National Bank of Washington v. Whitman*, 94 U. S. 343, 24 L. Ed. 229, goes into the question in detail. There the payee brought suit against the bank upon which the check was drawn, upon the theory that the payment upon the forged indorsement to the forger operated as an acceptance by the bank of the check sufficient to authorize an action by the real owner to recover thereon.

U. S. Portland Cement Co. v. U. S. National Bank, 157 Pac. 202; *Balsam v. Mutual Trust Co.*, 74 Misc. 465; *Duncan v. Berlin*, 69 N. Y. 151.

The payee of a check which has not been accepted by the bank upon which it is drawn, cannot maintain an action against the bank, even though the maker had on deposit sufficient funds to pay it.

Hentz v. National City Bank, 159 App. Div. (N. Y.) 743; *Matter of Estate of Stacey*, 89 Misc. 88.

For cases on the subject generally, see *A. S. American Bank v. National City Bank*, 161 App. Div. (N. Y.) 268; *Consolidated National Bank v. First National Bank*, 129 App. Div. (N. Y.) 538; *Eastman Kodak Co. v. National Park Bank*, 231 Fed. 320.

§ 326. Recovery of forged check. No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised.

This section appears only in the statutes of New York and New Jersey, but the courts in most of the states have held that the depositor owes the bank the duty of making an examination of his pass book and vouchers for the purpose of discovering any unauthorized payments which may have been made.

Leather Mfgs. Bank v. Morgan, 117 U. S. 96; *American Bank v. Bushey*, 7 N. W. (Mich.) 725; *Bank v. Allen*, 14 S. Rep. (Ala.) 335; *Scanlon v. Germania Bank*, 97 N. W. (Minn.) 380; *N. Y. Exchange Bank v. Houston*, 169 Fed. 785; *Nat. Dredging Co. v. President*, 69 Atl. (Del.) 607; *Kenneth v. National Bank*, 77 S. W. (Mo.) 1002; *National Bank v. Richmond Co.*, 56 S. E. (Va.) 96; *Myers v. S. W. Bank*, 193 Pa. St. 1.

"Primarily, a bank may pay and charge to its depositors only such sums as are duly authorized by the latter, and of course a forged check is not authority for such payment. It is, however, permitted to a bank to escape liability for re-payment of amounts paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payments and that it has been free from any negligence."

Morgan v. U. S. Mortgage and Trust Co., 208 N. Y. 218, 222, 101 N. E. 871, 872, L. R. A. 1915D, 741 Ann. Cas. 1914D, 462.

If the depositor has by his negligence caused loss to his bank, he should be responsible for the damage caused by his default, but beyond this his liability should not extend.

Critten v. Chemical Bank, 171 N. Y. 219, 229.

The relation between a bank and a depositor is that of debtor and creditor, and the law implies a contract on the part of the bank to disburse the money standing to the depositor's credit only upon his order, and in conformity with his directions; no payments can be charged against a depositor by a bank unless made to such persons as the depositor directed. Payments made therefore upon forged indorsements are at its peril. It can claim protection upon some principle of estoppel, or because of some negligence chargeable to the depositor.

Shipman v. Bank of State of New York, 126 N. Y. 318.

A depositor who sends his pass book to be written up and receives it back with his paid checks as vouchers, is bound under certain circumstances to examine the pass book and vouchers, and to report to the bank without unreasonable delay any errors which may be discovered.

Morgan v. U. S. Trust Co., 208 N. Y. 218; *Hardy v. Chesapeake Bank*, 51 Md. 562.

Rule as to savings banks.—The liability of a savings bank for payments made upon forged drafts, differs from that of ordinary banks of deposit, which are absolutely liable for payments on forged checks no matter how skillful the forgery may be. A savings bank is not liable for payments made upon a forged draft unless negligence can be imputed to it; that is to say, unless the discrepancy between the signature is so marked and plain that an ordinary competent clerk should detect the forgery.

Noah v. Bank for Savings, 171 App. Div. (N. Y.) 191; Kelly v. Buffalo Savings Bank, 180 N. Y. 171; see Section 42.

Pleadings.—The statute need not be pleaded, and under it either party may prove any fact which may establish a cause of action or defense if the pleadings are such as to permit it under the general rules.

Shattuck v. Guardian Trust Co., 204 N. Y. 200.

ARTICLE 19**Notes Given for Patent Rights and for a Speculative Consideration**

Section 330. Negotiable instruments given for patent rights.

331. Negotiable instruments given for a speculative consideration.

332. How negotiable bonds are made non-negotiable.

§ 330. Negotiable instruments given for patent rights.

A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

Constitutionality.—This section does not contravene the provisions of the Constitution of the United States (Art. 1, Sec. 8), which secures to a patentee for a limited time "the full and exclusive right and liberty of making, using and vending to others to be used," his invention or discovery, or of the Acts of Congress passed in pursuance thereof (5 U. S. Statutes at Large, 117). The said act does not operate as a lawful restraint upon the right of sale conferred upon the patentee by acts of Congress.

Herdic v. Roessler, 109 N. Y. 127; *Hankey v. Downet*, 116 Ind. 58; 1 L. R. A. 447; *Bohn v. Brown*, 101 Ky. 354; 41 S. W. 273; *State v. Cook*, 64 S. W. (Tenn.) 720; 62 L. R. A. 174; *Allen v. Reiley*, 203 U. S. 347, 358; *Benton v. Sikyta*, 84 Neb. 808; *Quiggle v. Herman*, 131 Wis. 379.

Kniss v. Holbrook et al. (Ind. App.) 40 N. E. 1118; *New v. Walker* 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *Sandage v. Studabaker Bros.*, 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; *Tredick v. Walters*, 81 Kan. 828, 106 Pac. 1067; *Pinney v. Bank*, 68 Kan. 223, 75 Pac. 119, 1 Ann. Cas. 331; *Id.*, 70 Kan. 879, 78 Pac. 151; *Nyhart v. Kubach*, 76 Kan. 154, 90 Pac. 796; *Bolte v. Sparks*, 85 Kan. 13, 116 Pac. 224; *Ensign & Co. v. Coffelt*, 102 Ark. 568, 145 S. W. 231; *Allen v. Riley*, 203 U. S. 347, 27 Sup. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137; *Woods v. Carl*, 203 U. S. 358, 27 Sup. Ct. 99, 51 L. Ed. 219; *Ozan Lumb. Co. v. Bank*, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353.

This section does not apply to notes given for articles manufactured under a patent, or for the purchase of territory for the sale of a patented article.

State Bank v. Jones, 58 N. E. (Ind.) 852; *Hankey v. Downey*, 116 Ind. 118.

The penal law in the State of New York makes it a misdemeanor for any person knowingly to take such note without having the words "given for a patent right." Sec. 1520 Penal Law. A statute making it a crime to take promissory notes in a prohibited transaction, does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime.

Anderson v. Etter, 102 Ind. 115; *Glenn v. Farmers' Bank*, 70 N. C. 191; *Palmer v. Minar*, 8 Hun. 342; *Cook v. Weirman*, 51 Iowa 561.

A promissory note, executed in a transaction forbidden by statute, is at least illegal as between the parties and those who have knowledge that the law was violated. It is an elementary rule that what the law prohibits, under a penalty, is illegal, and it cannot, therefore, be the foundation of a right as between the immediate parties.

Wilson v. Joseph, 107 Ind. 490; *New v. Walker*, 108 Ind. 369.

§ 331. Negotiable instruments given for a speculative consideration. If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater

by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

See note Sec. 96.

§ 332. How negotiable bonds are made non-negotiable.

The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this state, but not registered in pursuance of any state law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

ARTICLE 20

Laws Repealed; When to Take Effect

Section 340. Laws repealed.

341. When to take effect.

§ 340. **Laws repealed.** Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Variant.—The date in the above section refers to the statute of the State of New York, and of course the date as to the other states is that on which the law went into effect.

§ 341. **When to take effect.** This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Revised Statutes. . . . Part 2, chapter 4, title 2, All		
Laws of	Chapter	Section
1788.	33.	All
1794.	48.	All
1801.	44.	All
1819.	34.	All
1823.	216.	All
1826.	17.	All
1828.	20.	15, ¶ 30 (2d meet.)
1828.	20.	1, ¶¶ 51, 272, 393, 460 (2d meet.)
1835.	141.	All
1857.	416.	All
1865.	309.	All
1870.	438.	All
1871.	84.	All
1873.	595.	All
1877.	65.	All

1887.....	461.....	All
1888.....	229.....	All
1891.....	262.....	All
1894.....	607.....	All
1897.....	612	All
1897.....	613.....	2,3
1898.....	336.....	All
1904.....	287.....	All

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